Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

SESSIONS TANK LINERS, INC.,

Petitioner,

v.

JOOR MANUFACTURING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 25, 1994

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QUESTION PRESENTED

1. Whether the *Noerr* doctrine, as articulated by this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), should absolve an economically interested competitor who, through deliberate misrepresentations, exercises decisionmaking authority within a private standard-setting organization to exclude a rival's product merely because the particular industry generally requires government permits for the use of the product and the stigma affirmatively marketed by the competitor results in governmental denials of permits to the excluded rival.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the courts below are those named in the caption and have no parent or subsidiary corporations. However, petitioner at an earlier date conducted business under the name of Southwest Tank Liners, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sessions Tank Liners, Inc. ("Sessions"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 25, 1994.

OPINIONS BELOW

The latest opinion of the court of appeals, entered on February 25, 1994, is reported at 17 F.3d 295 (9th Cir. 1994). It appears in the Appendix ("App.") at A1-A21. The first opinion of the Court of Appeals for the Ninth

Circuit, affirmed, in material part, a grant of summary judgment for respondent, Joor Manufacturing, Inc. ("Joor"), and is reported at 827 F.2d 458 (9th Cir. 1987). It appears at App. A22-A45. That decision was then vacated by this Court in connection with and on the authority of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). This Court's decision is reported at 487 U.S. 1213 (1988), and is reprinted at App. A46. On remand, the court of appeals, in turn, remanded the case to the district court to apply the rules enunciated by this Court in *Allied*. That Ninth Circuit decision is reported at 852 F.2d 484 (9th Cir. 1988), and is reprinted at App. A47-A48. Finally, the decision of the district court on remand, after a bench trial, is reported at 786 F. Supp. 1518 (C.D. Cal. 1991), and is reprinted at App. A49-A91.

JURISDICTION

The opinion of the court of appeals was entered on February 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

The essential background facts giving rise to this case are well stated in the opinion of the court of appeals. That account is quoted here for convenience:

> The parties in this case are commercial competitors. Joor is in the business of manufacturing steel tanks designed for the underground storage of hazardous fluids. Sessions repairs leaking storage tanks in place by cutting them open, lining their interiors with a protective coating of epoxy, and resealing them.
>
> The cost of lining a tank is about the same as the cost of a new tank. Tank lining is cheaper than tank replacement, however, because lining does not entail the additional costs of removing and discarding the leaking tank and installing a new one. Tank lining, moreover, does not require the lengthy interruption of business that tank replacement often involves.
>
> In most of the localities in which Sessions did business prior to bringing this suit, tank lining required a permit. Authority to issue a tank lining permit usually rested with the local

fire marshal or fire chief. Before the events that precipitated this law suit, fire authorities granted tank lining permits to Sessions without reluctance, and Sessions's business grew continually.

The Western Fire Chiefs Association (WFCA) is a private, nonprofit organization whose voting membership comprises fire chiefs and other governmental employees. The WFCA periodically promulgates a revised Uniform Fire Code (UFC), a model safety code prescribing safety standards and procedures. Many local governments formally adopt each successive UFC revision as municipal law. In some cities and towns where the UFC has not been formally enacted into law, local officials enforce the UFC by refusing to issue permits for structures or activities that are not in conformance with the code.

During the time of Joor's involvement with the WFCA, revision of the UFC was a three-phase process. In the first phase, designated subcommittees of the standing UFC Committee inquired into various fire safety issues and drafted proposed revisions in accordance with their findings. After the proposed revisions were published in two trade journals, the UFC Committee convened to review each proposal and to vote on recommending its adoption or rejection by the WFCA. The meeting was open to subcommittee members and members of the public, who could register objections to the suggested revisions. The UFC Committee focused its review on revisions that were the subject of an objection. Proposals that were not the subject of an objection were recommended for approval.

In the final phase of the UFC revision process, the UFC Committee published in trade journals the proposed code changes and accompanying UFC Committee recommendations. At its annual meeting, the full body of the WFCA voted on the proposed revisions. Members of the public could attend this meeting and express support for or opposition to any proposal under consideration. The WFCA usually adopted proposed revisions to which no objections were made. If a majority of the WFCA approved a proposed revision, the revision was incorporated into the UFC.

Unlike the UFC Committee and the WFCA, whose memberships were limited to public officials, UFC subcommittees included industry representatives and members of the public. The conduct at issue in this case arises from appellant Joor's involvement – through its president, Howard Robbins – with the UFC subcommittee charged with revising UFC Article 79, the section of the code that prescribes guidelines for the handling and storage of flammable liquids. Robbins volunteered to work on the subcommittee and took part in revising the provisions relating to underground storage tanks. Robbins was assigned the task of reviewing the parts of Article 79 that dealt with depth and location specifications for underground storage tanks. At the time he became involved with the subcommittee, Article 79 did not address tank lining or require that leaking tanks be removed.

Alarmed at the news of Robbins's participation in the code revision process, representatives from Sessions provided the subcommittee with materials about the tank lining process and were

granted an opportunity to make a presentation on the subject, but the presentation was scheduled for the subcommittee's final meeting. Prior to the meeting, Robbins circulated among subcommittee members a letter in which he raised concerns about the safety of tank lining and stated that the WFCA might incur liability for sanctioning the process because it would void a tank's Underwriters Laboratories (UL) certification.

After the Sessions representatives made their presentation and left the meeting, Robbins rallied the subcommittee to amend Article 79 to include a provision requiring that leaking storage tanks be removed from the ground. Robbins reasserted that the lining process was unsafe and would void the UL label, subjecting the WFCA to liability. In spite of their awareness of Robbins's economic interest in a tank lining ban, the subcommittee unanimously approved Robbins's suggestion, incorporating the amendment in UFC § 79.601(d). In effect, the amendment was tantamount to a ban on tank lining.

With little or no discussion of the leaking tank removal provision, the UFC Committee approved the revised version of Article 79. The full body of the WFCA gave the revised article final approval.

Before the WFCA officially adopted the tank removal provision, Robbins sent letters to public entities, fire officials, standard-setting organizations and customer groups informing them of the proposed amendment. Fire officials in many localities began denying Sessions's requests for permits and Sessions's business declined

sharply. In the years following, Sessions's business continued to suffer.

App. A5-A8.

B. Mr. Robbins Secured Adoption of the Exclusionary Standard by Deliberate Misrepresentation

Two parts of the trial record bear special emphasis. The first part relates to Mr. Robbins' anticompetitive conduct. Mr. Robbins was the President and then sole shareholder of respondent Joor. The district court specifically found that respondent Joor, acting through Mr. Robbins was "economically interested" and not only "exercised decisionmaking authority," but, in truth, "essentially took over the decisionmaking process in the formulation" of the exclusionary standard. App. A64-A65. The district court also found that "Robbins presented a partisan portrait of tank lining" and that he "made knowingly false statements to the subcommittee" and actually "drafted the language" of the exclusionary standard. App. A65. Moreover, Mr. Robbins "prevented proponents of tank lining from fully and effectively articulating their contentions regarding the lining process to the subcommittee." *Id.* Finally, Mr. Robbins actually voted on his own proposal and gave no notice that a vote of the issue of tank lining would take place. App. A66.

The court of appeals does not quarrel with these district court findings. Indeed, it states: "Through deliberate misrepresentation, Joor caused a prominent standard-setting organization to amend its influential model

fire code to the disadvantage of Joor's competitor, appellee Sessions Tank Liners, Inc." App. A4. Mr. Robbins made deliberate misrepresentations in securing the amendment to the UFC. "He falsely represented that the lining process would void a tank's UL certification, and he made unfounded assertions regarding the safety of tank lining and its effect on a tank's structural integrity." App. A19.

Accordingly, it is clear that Joor, acting through Mr. Robbins, "organized and orchestrated the actual exercise of . . . decisionmaking authority in setting a standard." *See Allied*, 486 U.S. at 507.

C. Injury Suffered by Petitioner Sessions

The district court made an express finding in which it "rejects the contention that the adoption of the UFC [Uniform Fire Code] by local governments caused the injury plaintiff claims in this case." App. A78. To the contrary, the district court noted that Sessions proved its business was expanding before adoption by the WFCA of its UFC revisions and that before that adoption in its model code, Sessions had little difficulty securing the required permits to reline gasoline tanks. The district court also found that "Sessions proved that almost immediately after the adoption of UFC § 79.601(d) by the subcommittee *and prior to its adoption by the WFCA*, Joor 'marketed' the stigma which it had caused the subcommittee to place on tank lining by sending letters to public agencies and customers urging its prohibition." App. A79-A80 (emphasis added;

footnote omitted). Accordingly, the district court concluded that "Sessions has established 'independent marketplace harm' caused by the stigma, separate and apart from that caused by the adoption of UFC § 79.601(d) by local governments." App. A80.

Significantly, the court of appeals does not overturn this fact finding as unsupported by the record evidence. Rather, it ignores this finding on the premise it is irrelevant because respondent "Joor is shielded from liability for [petitioner Sessions'] injuries" because those injuries are "the direct result of governmental action." App. A17.

REASONS FOR GRANTING THE WRIT

This Court is now faced with the challenging issue, not presented by *Allied*, of whether a competitor may recover damages proximately caused by an economically interested competitor who subverts the exercise of decisionmaking authority in the private standard-setting process to create a ban on a rival's product that is then enforced by local government officials.

The Court of Appeals for the Ninth Circuit held that, under the *Noerr* doctrine, a competitor is not liable for damages caused by deliberate misrepresentations made to a private standard-setting association that is later relied on by government officials. In so holding, the Ninth Circuit misinterprets and significantly emasculates this Court's decision in *Allied*. The Ninth Circuit's holding conflicts also with the decisions of other circuits.

The court of appeals is wrong to have concluded that *Noerr* immunizes Joor's infliction of damages on Sessions

through conduct that it conceded was not protected by *Noerr* as interpreted by *Allied*. The fortuitous fact that here, as opposed to *Allied*, the tank lining industry generally requires government permits does not warrant application of the *Noerr* doctrine. The district court found, and the Ninth Circuit did not dispute, that Joor made knowingly false misrepresentations to local fire officials and induced them to stop issuing permits to Sessions. An economically interested competitor should be liable for the damages caused and should not get "two bites" of the *Noerr* "apple," one for liability and another for damages.

Moreover, in deciding that respondent's exposure to liability was protected by *Noerr*, the court cavalierly disregards the district court's carefully documented findings that respondent aggressively marketed the "stigma" even before the ban on the tank lining had been adopted by the WFCA. In sidestepping this finding, the court of appeals violates a fundamental premise of appellate review. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S POLICY DECISION IN *ALLIED* AND WILL ENCOURAGE SUBVERSION OF PRIVATE STANDARD-SETTING ORGANIZATIONS BY ECONOMICALLY INTERESTED COMPETITORS

The court of appeals decision to protect an economically interested decisionmaker who subverts the processes of a private standard-setting organization merely because the particular standard is one which, by its nature, requires governmental action (here in the form of

permits), undermines the policy reasons underlying this Court's decision in *Allied*.

In *Allied*, this Court articulated, for the first time, that not *every* effort to genuinely influence governmental action is *Noerr* protected. Rather, *Noerr* protection would depend upon the impact, context and nature of the activity under review. *Allied*, 486 U.S. at 503-04.

Allied characterized private standard-setting as "commercial activity" traditionally subject to antitrust scrutiny because "standards set by such associations have a serious potential for anticompetitive harm." *Id.* at 500 (footnote omitted). This Court reasoned that the "antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." *Id.* at 507 (footnote omitted).

From this analysis emerged the rule that economically interested participants who exercise decisionmaking authority over private standard-setting processes are not *Noerr* protected if they subvert or bias the process in a manner that excludes a competitor or restrains competition.

Both the district court and court of appeals agree that Mr. Robbins, the President and then sole shareholder of respondent Joor, was "economically interested" and not only "exercised decisionmaking authority," but, in truth, "essentially took over the decisionmaking process in the formulation" of the exclusionary standard. App. A64-A65.

The district court also explicitly found that "Robbins presented a partisan portrait of tank lining" and that he

"made knowingly false statements to the subcommittee" and actually "drafted the language" of the exclusionary standard. App. A65. Moreover, Mr. Robbins "prevented proponents of tank lining from fully and effectively articulating their contentions regarding the lining process to the subcommittee." *Id.* Finally, Mr. Robbins actually voted on his own proposal and gave no notice that a vote of the issue of tank lining would take place. App. A66. The Ninth Circuit does not challenge and, in fact, agrees with these findings of the district court.

However, indifferent to the fact that Joor had achieved an anticompetitive objective by precisely the kind of subversion that this Court sought to prevent, the Ninth Circuit nevertheless invoked *Noerr* to create an intervening cause that insulates an intentional wrongdoer from liability. The Ninth Circuit decision rests entirely on the fortuitous fact that the excluded tank lining process required *a priori* governmental approval before it could be utilized by oil companies or other gasoline station owners. Had no such approval been required, the district court decision would have been affirmed.

The Ninth Circuit's approach rewards subversion of the private standard-setting process, produces trade restraints, deprives consumers of a desirable product or service, eliminates quality competition, excludes rivals and facilitates oligopolistic prices. *See* 7 P. Areeda, *Antitrust Law* § 1503 at 373 (1986). A decision which so seriously undermines, indeed threatens to emasculate, a carefully reasoned, policy-based decision of this Court, warrants review.

II. THE NINTH CIRCUIT DECISION CREATES A CONFLICT AMONG THE CIRCUITS

In holding that the deliberately misleading evidence used by Joor to secure the adoption of the virtual ban on tank lining caused no liability because governmental action was an intervening cause, the Ninth Circuit creates a conflict among the circuits.

Specifically, the Fifth Circuit has adopted a different analysis. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), that court held that false information filed with the Texas Railroad Commission which induced a governmental decision to limit production was not entitled to *Noerr* protection. The court reasoned that because the decision of the Texas Railroad Commission was induced by fraud, it was not valid governmental action and could not, therefore, constitute an intervening cause. Other courts and commentators, not always by uniform reasoning, agree with that outcome. *See Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); P. Areeda & H. Hovenkamp, *Antitrust Law* § 206.2 at 75 (1993 Supp.). Indeed, the Ninth Circuit in this case is arguably at odds with its earlier decision which denied *Noerr* protection to deliberate misrepresentations of fact to an administrative body. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

This intercircuit (Second, Fifth and District of Columbia Circuits) and intracircuit conflict strongly demonstrates the need for review.

III. THE EFFICACY OF THE FIRST AMENDMENT DOES NOT REQUIRE A CONCLUSIVE PRESUMPTION IN FAVOR OF THE WRONGDOER

In *Allied*, this Court elected to review the case as presented by the decision of the Second Circuit. Accordingly, review was effectively limited to liability because only damages caused by the "stigma," and not by direct government action, were awarded. Therefore, this Court did not decide the question of whether a plaintiff injured by an economically interested competitor who subverts the private standard-setting process through deliberate misrepresentation, should escape liability where only government action is induced.

The Ninth Circuit in this case concludes that to impose antitrust liability in such cases would involve a "deconstruction" of the governmental decisionmaking process. However, this inquiry is no different or onerous than the inquiry into whether the economically interested participant in the private standard-setting process exercised decisionmaking authority; it involves some level of "deconstruction" of the decisionmaking process. As the district court carefully observed "[n]o 'deconstructing' of the government decisionmaking process is involved" because the causal nexus in such case (as in any other) can be established by record evidence. App. A84 (citing P. Areeda & H. Hovenkamp, *Antitrust Law* § 204.1(d) at 69-71 (1990 Supp.).

Moreover, the Ninth Circuit's "deconstructing" argument cannot be reconciled with this Court's decision in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176-77 (1965), in which this Court found that "fraud" practiced on the U.S. Patent Office resulting in a patent induced by that fraud, could create liability under Section 2 of the Sherman Act (15 U.S.C. § 2) if the other elements of the offense were satisfied. Then, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976), this Court found that the Michigan Public Service Commission's routine approval of an anticompetitive tariff was not immunized under *Parker v. Brown*, 317 U.S. 341 (1943), because in "deconstructing" the process, the Court concluded that the tariff was a result of purely private action. In *Cantor*, this court held that a tariff filed by an electric utility could not evade scrutiny under the antitrust laws simply because it was filed in accordance with state law and approved by a state agency. The *Cantor* plurality stated that:

> nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-02.

Accordingly, in both *Walker Process* and *Cantor*, this Court had to "deconstruct" government decisionmaking to decide the case. In each case, this Court denied antitrust immunity or exemption to the wrongdoer. This case cries for similar treatment.

There is nothing magical about physically tracing a chain of causation. But, the Ninth Circuit, rejecting what is commonplace in other contexts, has *conclusively presumed* that the actions of local governmental authorities to deny permits was *not* influenced by the deliberate misrepresentation which produced the exclusionary product standard. The First Amendment does not require that a wrongdoer be entitled to such a conclusive presumption. The First Amendment has limited interest in protecting the kind of deliberate lying and Machiavellian anticompetitive manipulation as disclosed by this record: "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

In a libel context, this Court's views have been even stronger:

> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . . " Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964). And, in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), the Court said that "[n]either lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation."

Clearly, the issue of whether a wrongdoer is entitled to the *conclusive* presumption based on "deliberate misrepresentation" which has been accorded by the Ninth Circuit in this case warrants full briefing, argument and decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SESSIONS TANK LINERS, INC., Plaintiff-Appellee, v. JOOR MANUFACTURING, INC., Defendant-Appellant.	No. 92-55085 D.C. No. CV-84-6363-MRP OPINION

Appeal from the United States District Court
for the Central District of California.
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
January 8, 1993 – Pasadena, California

Filed February 25, 1994

Before: William C. Canby, Jr., and William A. Norris, Circuit Judges, and Jack E. Tanner*, District Judge.

Opinion by Judge Canby; Dissent by District Judge Tanner

*The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY

Antitrust/Exemptions – Noerr-Pennington Act/ Government Action

The court of appeals reversed a district court judgment. The court held that a steel tank manufacturer that, through deliberate misrepresentations, caused a prominent standard-setting organization to amend its influential model fire code to the disadvantage of the manufacturer's competitor, did not violate federal antitrust laws or commit the California tort of intentional interference with prospective economic advantage.

Appellant Joor Manufacturing, Inc., a manufacturer of steel tanks designed for the underground storage of hazardous fluids, became involved with the Western Fire Chiefs Association (WFCA), which promulgates a revised Uniform Fire Code (UFC) that is adopted by many local governments as municipal law. Joor's president, Howard Robbins, took part in revising the UFC's provisions relating to underground storage tanks. He made misrepresentations to a WFCA subcommittee regarding the safety of tank lining. The WFCA approved Robbins' suggested amendment to the UFC, in effect banning tank lining. Robbins also sent letters to public entities, fire officials, and other groups informing them of the proposed amendment.

Appellee Sessions Tank Liners, Inc., which repairs leaking storage tanks by lining their interiors, suffered a decline in business. Sessions sued Joor, alleging violations of federal antitrust laws and California's unfair

competition laws. Concluding that Joor's conduct could not be deemed a valid effort to petition lawmakers, the district court ruled that *Noerr-Pennington* immunity did not protect Joor from antitrust liability. The court found Joor liable for a violation of Sherman Act § 1 and the California tort of intentional interference with prospective advantage. Joor appealed.

The injuries for which Sessions sought recovery flowed directly from government action. Sessions never proved that it sustained injuries from anything other than the actions of municipal authorities; Sessions did not show that any potential tank lining customer in jurisdictions that were not enforcing the WFCA tank removal provision decided not to engage Sessions' services because of the WFCA's amendment; nor did Sessions adduce any evidence that Joor's actions caused independent marketplace harm in jurisdictions that continued to permit tank lining. Because the injuries Sessions complained of were the result of governmental action, Joor was shielded by petitioning immunity from liability under the antitrust laws.

In addition, under the circumstances of this case, the California Supreme Court would hold Joor immune from damages for interference with prospective economic advantage. The California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flowed from governmental decisions of disinterested public officials.

Senior District Judge Tanner dissented, stating that the district court correctly concluded that Joor was not shielded by *Noerr* immunity.

COUNSEL

Jerome I. Braun, Farella, Braun & Martel, San Francisco, California, and David E. Lundin, Rancho Santa Fe, California, for the defendant-appellant.

Maxwell M. Blecher, Blecher, Collins & Wienstein [sic], Los Angeles, California, for the plaintiff-appellee.

Andrew D. Hutton, Michael J. Shockro, Latham & Watkins, Los Angeles, California, and Raymond A. Tabar, John G. Nelson, Thomson & Nelson, Whittier, California, for the amicus.

OPINION

CANBY, Circuit Judge

Appellant Joor Manufacturing, Inc. ("Joor"), challenges the district court's decision holding Joor liable for anticompetitive conduct in violation of federal antitrust laws and for the California tort of intentional interference with prospective economic advantage. Through deliberate misrepresentation, Joor caused a prominent standard-setting organization to amend its influential model fire code to the disadvantage of Joor's competitor, appellee Sessions Tank Liners, Inc. ("Sessions").

Because Sessions has failed to prove that its injuries result from anything other than governmental action, we reverse the district court's judgment on the antitrust

claims. We also conclude that Joor is shielded from liability on the California commercial tort claim. We therefore reverse the district court's judgment on that claim as well.

BACKGROUND

The parties in this case are commercial competitors. Joor is in the business of manufacturing steel tanks designed for the underground storage of hazardous fluids. Sessions repairs leaking storage tanks in place by cutting them open, lining their interiors with a protective coating of epoxy, and resealing them.

The cost of lining a tank is about the same as the cost of a new tank. Tank lining is cheaper than tank replacement, however, because lining does not entail the additional costs of removing and discarding the leaking tank and installing a new one. Tank lining, moreover, does not require the lengthy interruption of business that tank replacement often involves.

In most of the localities in which Sessions did business prior to bringing this suit, tank lining required a permit. Authority to issue a tank lining permit usually rested with the local fire marshal or fire chief. Before the events that precipitated this law suit, fire authorities granted tank lining permits to Sessions without reluctance, and Sessions's business grew continually.

The Western Fire Chiefs Association (WFCA) is a private, nonprofit organization whose voting membership comprises fire chiefs and other governmental employees. The WFCA periodically promulgates a

revised Uniform Fire Code (UFC), a model safety code prescribing safety standards and procedures. Many local governments formally adopt each successive UFC revision as municipal law. In some cities and towns where the UFC has not been formally enacted into law, local officials enforce the UFC by refusing to issue permits for structures or activities that are not in conformance with the code.

During the time of Joor's involvement with the WFCA, revision of the UFC was a three-phase process. In the first phase, designated subcommittees of the standing UFC Committee inquired into various fire safety issues and drafted proposed revisions in accordance with their findings. After the proposed revisions were published in two trade journals, the UFC Committee convened to review each proposal and to vote on recommending its adoption or rejection by the WFCA. The meeting was open to subcommittee members and members of the public, who could register objections to the suggested revisions. The UFC Committee focused its review on revisions that were the subject of an objection. Proposals that were not the subject of an objection were recommended for approval.

In the final phase of the UFC revision process, the UFC Committee published in trade journals the proposed code changes and accompanying UFC Committee recommendations. At its annual meeting, the full body of the WFCA voted on the proposed revisions. Members of the public could attend this meeting and express support for or opposition to any proposal under consideration. The WFCA usually adopted proposed revisions to which no objections were made. If a majority of the WFCA

approved a proposed revision, the revision was incorporated into the UFC.

Unlike the UFC Committee and the WFCA, whose memberships were limited to public officials, UFC subcommittees included industry representatives and members of the public. The conduct at issue in this case arises from appellant Joor's involvement – through its president, Howard Robbins – with the UFC subcommittee charged with revising UFC Article 79, the section of the code that prescribes guidelines for the handling and storage of flammable liquids. Robbins volunteered to work on the subcommittee and took part in revising the provisions relating to underground storage tanks. Robbins was assigned the task of reviewing the parts of Article 79 that dealt with depth and location specifications for underground storage tanks. At the time he became involved with the subcommittee, Article 79 did not address tank lining or require that leaking tanks be removed.

Alarmed at the news of Robbins's participation in the code revision process, representatives from Sessions provided the subcommittee with materials about the tank lining process and were granted an opportunity to make a presentation on the subject, but the presentation was scheduled for the subcommittee's final meeting. Prior to the meeting, Robbins circulated among subcommittee members a letter in which he raised concerns about the safety of tank lining and stated that the WFCA might incur liability for sanctioning the process because it would void a tank's Underwriters Laboratories (UL) certification.

After the Sessions representatives made their presentation and left the meeting, Robbins rallied the subcommittee to amend Article 79 to include a provision requiring that leaking storage tanks be removed from the ground. Robbins re-asserted that the lining process was unsafe and would void the UL label, subjecting the WFCA to liability. In spite of their awareness of Robbins's economic interest in a tank lining ban, the subcommittee unanimously approved Robbins's suggestion, incorporating the amendment in UFC § 79.601(d). In effect, the amendment was tantamount to a ban on tank lining.

With little or no discussion of the leaking tank removal provision, the UFC Committee approved the revised version of Article 79. The full body of the WFCA gave the revised article final approval.

Before the WFCA officially adopted the tank removal provision, Robbins sent letters to public entities, fire officials, standard-setting organizations and customer groups informing them of the proposed amendment. Fire officials in many localities began denying Sessions's requests for permits and Sessions's business declined sharply. In the years following, Sessions's business continued to suffer.

Sessions filed a complaint in district court alleging that Joor had violated federal antitrust laws and California unfair competition laws. Ruling that Joor was shielded by *Noerr-Pennington* immunity from antitrust liability, the district court granted partial summary judgment in favor of Joor. On interlocutory review, this court substantially upheld the district court's decision. *Sessions Tank Liners v. Joor Mfg.*, 827 F.2d 458 (9th Cir. 1987). The

Supreme Court, however, vacated our decision and remanded it for further consideration in light of the then-recent decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 487 U.S. 1213 (1988). We remanded the case to the district court. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 852 F.2d 484 (9th Cir. 1988).

After a bench trial the district court ruled that *Noerr* immunity does not protect Joor from antitrust liability. The district court focused its analysis on whether Joor's machinations in the Article 79 subcommittee constituted a "valid effort to influence government action." *Sessions*, 786 F. Supp. at 1525. Engaging in the "intensely factual inquiry" mandated by the Supreme Court's opinion in *Allied Tube*, the district court found that Robbins had knowingly made false statements to the subcommittee. It also found that Robbins had taken advantage of his affiliation with the subcommittee to promote the tank lining ban and prevent the proponents of tank lining from effectively presenting their side of the issue to the subcommittee. Concluding that Joor's conduct could not be deemed a valid effort to petition lawmakers, the district court ruled that Joor was not shielded by *Noerr* immunity. *Id.* at 1526-27.

The court found Joor liable for a violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and for the California tort of intentional interference with prospective advantage. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 786 F. Supp. 1518 (C.D. Cal. 1991). It is the district court's judgment against Joor that we review here.

ISSUES ON APPEAL

In this case we are called upon to decide whether a private party can be held liable, under federal antitrust laws and the California common law, for anticompetitive restraints resulting from valid governmental action.

DISCUSSION

I. The Antitrust Claim

Joor contends that the district court erred in ruling that Joor is not shielded by *Noerr-Pennington* immunity from liability on the antitrust claim.

Antitrust petitioning immunity has its roots in the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 350 (1942). In *Parker*, the Court ruled that states cannot be held liable under the Sherman Act for anticompetitive restraints imposed "as an act of government." *Id.* at 352. The *Parker* holding was based on the Court's conclusion that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 351. In the absence of some stronger indication that Congress intended the Sherman Act to apply to states as well as to private parties, the Court was unwilling to subject states to antitrust liability. *Id.*

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court recognized a corollary to the *Parker* state action immunity doctrine: "[T]he federal antitrust laws do not regulate the conduct

of private individuals in seeking anticompetitive action from the government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1354-55. The defendants in *Noerr* were a consortium of railroad executives that had conducted a successful publicity campaign designed to arouse public disfavor of the freight trucking industry in order to impair the truckers' ability to compete with the railroads. The campaign succeeded on two levels: it led to the retention, passage and enforcement of state laws limiting freight trucking, and it damaged the truckers' relationships with their customers. *Noerr*, 365 U.S. at 129-32.

Hearkening to the same principles underlying the *Parker* doctrine, the *Noerr* Court ruled that the railroads could not be held liable under the antitrust laws for effects of their campaign. *Id.* at 141-43; *see also Omni*, 111 S. Ct. at 1354-55 (discussing *Noerr*); 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 204b (1978).

> Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.

Noerr, 365 U.S. at 140-41. To impose antitrust liability on private parties for urging government action, the Court noted, would present other difficulties. It would be detrimental to democratic government because it would make citizens reluctant to inform lawmakers of their desires for

laws that restrain trade, and it might offend the First Amendment right to petition the government for a redress of grievances. *Id.* at 137-38.

The *Noerr* Court also rejected the proposition that petitioning immunity was limited to injuries flowing directly from governmental action. It held that the railroads were also shielded from liability for the harm the truckers suffered in their relationships with their customers. In the Court's view, that injury was "incidental" to the defendants' campaign to influence legislation. To impose liability for such incidental effects would "be tantamount to outlawing" the petitioning activity itself. *Id.* at 143-44.[1]

The Court further defined the *Noerr* immunity doctrine in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the case on which the district court relied in holding Joor liable for violating the Sherman Act. The *Allied* court recognized that, if carried to its extreme, antitrust petitioning immunity could be used to shield defendants from liability for all manner of anticompetitive conduct as long as the injury claimed could be characterized as incidental to an effort to influence governmental action. The Court addressed this problem by ruling that immunity attaches only when the anticompetitive conduct at issue constitutes a *valid* effort to petition the government.

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[1] In later cases, the Court recognized that *Noerr* immunity applies to attempts to influence administrative, executive and judicial action. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

486 U.S. at 499-500. "The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Id.* at 499.

In applying *Allied* to Joor's conduct, the district court overlooked a key distinction between *Allied* and this case. The plaintiff in *Allied* was awarded damages only on the theory that the stigma of banning the plaintiff's product from a uniform code caused independent marketplace harm to the plaintiff in jurisdictions that permitted the use of the plaintiff's products. *Id.* at 498 n.2. In contrast, Sessions has never proved that it sustained injuries from anything other than the actions of municipal authorities. *Sessions*, 786 F. Supp. at 1532. Sessions has not shown that any potential tank lining customer in jurisdictions that were not enforcing the WFCA tank removal provision decided not to engage Sessions's services because of the WFCA's adoption of section 79.601(d). Nor has Sessions adduced any evidence that Joor's actions caused independent marketplace harm in jurisdictions that continued to permit tank lining. Unlike the plaintiff in *Allied*, Sessions was not awarded damages on the theory that Joor's "marketing the stigma" of section 79.601(d) caused Sessions any loss of business independent of the losses resulting from the permit denials. *Id.* The injuries for which Sessions seeks recovery flowed directly from government action. This fact takes the case entirely out of the realm of *Allied*.

Because the injuries Sessions complains of are the result of governmental action, Joor is shielded by petitioning immunity from liability under the antitrust laws. Our conclusion is grounded in the justification for antitrust petitioning immunity first enunciated in *Noerr* and

consistently reaffirmed in later Supreme Court opinions. *See, e.g., Omni,* 111 S. Ct. at 1354-55; *California Motor Transport,* 404 U.S. at 509-10; *Pennington,* 381 U.S. at 669-671. The antitrust laws promote competition by prohibiting private actors from combining or conspiring to restrain trade. 15 U.S.C. §§ 1 & 2; *Parker,* 317 U.S. at 350-51; *Noerr,* 365 U.S. at 136-37. Unlike private actors acting in combination, disinterested governmental decision-makers who take measures to inhibit competition are accountable politically and procedurally to those affected by the anticompetitive measures. *Parker,* 317 U.S. at 352; Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity,* 80 Cal. L.R. 1177, 1240-43 (1992). The policies underlying the Sherman Act do not obtain in this context.[2]

To rule otherwise and hold Joor liable for injuries flowing from governmental decision-makers' imposition of an anticompetitive restraint, we would have to find that the restraint was imposed *because of* Joor's petitioning efforts. Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the *Parker* and *Noerr* decisions. *See Omni,* 111 S. Ct. at 1352, 1355 (rejecting suggestion that there is a conspiracy exception to petitioning immunity in cases where "government officials conspire with a

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[2] Sessions concedes as much in its brief when it states, "[T]he *Noerr* doctrine and its progeny rest on the premise that the Sherman Act regulates business activity, but not political activity. Pure political activity is beyond the reach of the Sherman Act." Appellee's Brief at 3.

private party to employ government action as a means of stifling competition" because such an exception would be "impracticable or beyond the purpose of the antitrust laws"); *Noerr*, 365 U.S. at 145.

The district court's holding illustrates the problems that arise when private parties are held liable under the antitrust laws for injuries flowing from governmental action. In the district court's view, the fact that Sessions's injuries flowed from local officials' refusal to grant tank lining permits did not relieve Joor of antitrust liability. Joor's actions would be shielded by *Noerr* immunity, the court reasoned, only if the permit denials could be characterized as "an 'intervening cause' breaking the link between a private party's pursuit of an anticompetitive objective and a plaintiff's injury." *Sessions*, 786 F. Supp. at 1533. The government action would be recognized as an intervening cause, the district court stated, only if invoking petitioning immunity was necessary (1) to prevent courts from second-guessing the decisions of better-informed government officials, (2) to avoid deconstructing the governmental decision-making process to determine whether a particular decision was an independent governmental action and not the result of a party's improper influence, or (3) to protect a citizen's First Amendment right to petition the government and to ensure that the government is not deprived of useful information. *Id.* at 1534. The district court concluded that none of these policy considerations applies to the present case. *Id.* And yet, the district court necessarily deconstructed the decision-making process in finding that Joor's misrepresentations regarding the safety of tank

lining were the cause of the local officials' decisions to deny Sessions's requests for permits.

In addition to its dependence on deconstruction, the "intervening cause" analysis presents other difficulties. We cannot accept an interpretation of the *Noerr* doctrine that grants immunity only when the defendant's efforts to persuade government officials to impose anticompetitive restraints were not the cause of the governmental restraints actually imposed. So interpreted, the immunity shields nothing that would otherwise cause liability. Joor would be protected from antitrust liability only if the court found that the permit denials were motivated by factors wholly unrelated to Robbins' activities in the Article 79 subcommittee and his subsequent campaign to notify public officials of the tank lining ban. *See id.*

This approach cannot be reconciled with the principles underlying the antitrust petitioning immunity doctrine. " '[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136); *accord Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1383 (7th Cir. 1992) (holding that defendant bar associations that had urged state supreme court to adopt bar disciplinary rules were immune from liability under Sherman Act for anticompetitive injuries resulting from court's adoption of rules); *Juster Assoc. v. City of Rutland*, 901 F.2d 266, 271 (2d Cir. 1990) (holding that developer and city were immune from antitrust liability because restraint complained of was the consequence of governmental action). Immunity from liability

for restraints imposed by the government attaches regardless of the "validity" of the efforts of those urging the action.[3] *See Omni*, 111 S. Ct. 1354-56 (rejecting suggestion that immunity from anticompetitive injuries flowing from government action does not attach when action is the result of conspiracy between defendants and governmental officials); *Noerr*, 365 U.S. at 145 (applying petitioning immunity to private party that had "deliberately deceived the public and public officials" in lobbying campaign aimed at effecting enactment of anticompetitive legislation).

Because the only anticompetitive injuries that Sessions complains of are the direct result of governmental action, we conclude that Joor is shielded from liability for these injuries by petitioning immunity.[4]

II. The State Law Claim

Joor asserts that the district court erred in ruling that Sessions was entitled to judgment on its claim that Joor had committed the common-law tort of intentional interference with prospective economic advantage.[5] According to Joor, any conduct shielded by the doctrine of

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[3] We re-emphasize that the liability that *Allied* attached to "invalid" efforts to petition the government was liability for damages flowing from the non-governmental, independent market-place harm that the defendants' activities caused.

[4] Joor raises other points of error concerning the district court's decision holding Joor liable to Sessions under the Sherman Act. Because we determine that Joor is immune from the antitrust claims, we do not reach these arguments.

[5] To prevail on a claim of intentional interference with prospective economic advantage the plaintiff must demonstrate:

petitioning immunity in the federal antitrust context is perforce shielded in the state common-law context.

We need not decide whether antitrust petitioning immunity and immunity under state tort law are perfectly coextensive. *See Blank v. Kirwan*, 39 Cal.3d 311, 703 P.2d 58, 216 Cal.Rptr. 718 (Cal. 1985)(citing separate grounds for barring recovery on antitrust claims and tortious interference claims); *Willis v. Santa Ana Community Hospital*, 58 Cal.2d 806, 809, 376 P.2d 568, 570, 26 Cal.Rptr. 640, 642 (Cal. 1962)(holding that state antitrust statutes do not supersede all common-law commercial torts). We are convinced that, in the circumstances of this case, the California Supreme Court would hold Joor immune from damages for interference with prospective economic advantage.

The California Supreme Court has carefully considered the relationship of antitrust petitioning immunity to the tort of interference with prospective economic advantage. In *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 791 P.2d 587, 270 Cal.Rptr. 1 (Cal. 1990)("*PG&E*"), the Court dealt with a claim that the defendant had induced a governmental agency to initiate litigation seeking to avoid a contract to supply hydroelectric power to the plaintiff PG&E. The Court held that

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"(1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant." *Bland* [sic] *v. Kirwan*, 703 P.2d 58, 70 (Cal. 1985).

"to permit [this] cause of action to be stated when the only interference alleged is that defendant induced the bringing of potentially meritorious litigation would be an unwarranted extension of the scope of these torts and a pernicious barrier to free access to the courts." Id. 791 P.2d at 588. The Court approvingly recited the evolution of the *Noerr* immunity, and stated that "this doctrine relies on the constitutional right to petition for redress of grievances to establish that there is no antitrust liability for petitioning any branch of government, even if the motive is anticompetitive." *Id.* at 595.

It is true that this latter statement in *PG&E* is expressly rested on the First Amendment, and Joor's entitlement under that Amendment is limited in the present case. Joor made deliberate misrepresentations in securing the amendment to the UFC; he falsely represented that the lining process would void a tank's UL certification, and he made unfounded assertions regarding the safety of tank lining and its effect on a tank's structural integrity. Those statements, of themselves, have no real claim to First Amendment protection. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), *cert. denied*, 483 U.S. 1227 (1983); *see also California Motor Trans.*, 404 U.S. at 512-13 (recognizing that, in various fora, sanctions are imposed for deliberate misrepresentations).

PG&E recognizes, however, that the very existence of a tort action for the seeking of valid governmental action exerts an undesirable chilling effect on the access of others to government, regardless of the motives of the particular party before the court. *PG&E*, 791 P.2d at 597. Moreover, "[t]he torts of inducing breach of contract and

interference with prospective advantage have been criticized as protecting the secure enjoyment of contractual and economic relations at the expense of our interest in a freely competitive economy." *Id.* For this reason, the California Supreme Court has limited the types of prospective advantage that it will protect: "a person's expectancy in the outcome of a government licensing proceeding is not protected against outside interference." *Id.* at 598 (citing *Blank v. Kirwan*, 39 Cal.3d at 330, 703 P.2d at 70, 216 Cal.Rptr. at 730).

The only tort involving inducement of litigation that the California Court was willing to recognize in *PG&E* was the tort of malicious prosecution, with its dual protective requirements of a lack of probable cause and a lack of success in the litigation. *Id.* at 598. If any analogy at all is to be made between the tort of malicious prosecution and that of interference with prospective economic advantage, the fact that Joor succeeded in influencing the disputed licensing decisions would preclude recovery.

Finally, we believe that the California courts, if presented with the policy considerations against deconstruction of public decisionmaking that we discussed in Part I, would find them as compelling in the tort law context as they are in the antitrust context. To impose tort liability for damages resulting from valid governmental decisions by public officials requires an examination of the motives of those officials that judges, federal or state, are reluctant to undertake. In the present case, for example, the district court found that the fire officials "relied on [Joor's] misrepresentation in denying permits to Sessions to engage in tank lining." *Sessions*, 786 F. Supp. at 1535. The same

policy considerations that led the federal courts to conclude that the antitrust laws are not intended to precipitate such deconstruction of public decisionmaking would, we are convinced, lead the California courts to conclude that the state tort law of interference with prospective economic advantage is also not intended to permit such deconstruction.

We conclude, therefore, that the California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flow from governmental decisions of disinterested public officials. We accordingly reverse the judgment of the district court awarding such damages.

CONCLUSION

The judgment of the district court awarding damages to Sessions under federal and state law is

REVERSED.

TANNER, Senior District Judge dissenting.

I believe the district court properly applied the facts of this case to the law as set forth in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and has correctly concluded that Joor was not shielded by *Noerr* immunity. I dissent.

SESSIONS TANK LINERS, INC. dba Southwest Tank Liners, Inc., Plaintiff-Appellant,

v.

JOOR MANUFACTURING, INC., et al., Defendants-Appellees.

Nos. 86-6208, 86-6470

United States Court of Appeals, Ninth Circuit.

Argued and Submitted, April 8, 1987.

Decided Sept. 2, 1987.

Maxwell M. Blecher and Christopher Layne, Los Angeles, Cal., Laurie J. Orange, Sternberg, Eggers, Kidder & Fox, San Diego, Cal., for plaintiff-appellant.

David E. Lundin, Finley, Kumble, Wanger, Heine, Underberg, Manley, Myerson & Casey, San Diego, Cal., for defendants-appellees.

William J. Meeske, Los Angeles, Cal., Alexander D. Thomson, Raymond A. Tabar, Whittier, Cal., Catherine G. O'Sullivan and Dean C. Graybill, Washington, D.C., for amici curiae.

Appeals from the United States District Court for the Central District of California.

Before SNEED, BOOCHEVER and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Joor Manufacturing (Joor) successfully sought to have the Western Fire Chiefs Association (WFCA) amend

its influential model fire code in a manner disadvantageous to Sessions Tank Liners, Inc. (Sessions), a competitor. Sessions sued Joor for violating the Sherman Act. The district court granted the defendant summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability. Sessions appeals.

We conclude that legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine. However, we also conclude that "abuses" of the code-promulgating process designed primarily to harm competitors are a "sham" and fall outside *Noerr-Pennington* protection. Because Sessions has stated a very limited "sham" exception claim not considered by the court below, we reverse and remand for further proceedings.

I.

FACTS

Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this underground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however,

demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code), a model fire safety code highly influential in the western states.[1] The WFCA is a nonprofit, voluntary membership organization established in 1891. Although it has no official governmental status, the WFCA limits its voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions. The Code has no legal force until local governments choose to adopt or enforce its provisions.

In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of inflammable fluids.[2] One of the Article 79

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[1] The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern and mid-western states." Brief of the WFCA et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisions or standards into law.

[2] The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often

subcommittee's tasks was to develop safety standards for the underground repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion – which might have caused the leakage – will go undetected. Sessions' epoxy lining stops leaks but does not strengthen the tank walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a

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invited to serve thereon. At the time of the events in question, such private industry members had full voting powers within the subcommittee on which they served. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members – no private industry representatives – may vote. After the hearings, both the original proposal and the Code Committee recommendation are again published in the trade journals. Finally, at the WFCA annual conference, where once more anyone may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins's motion carried unanimously.

Neither Sessions nor any other firm in the tank lining field had a voting representative on the Article 79 subcommittee. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to submit materials to the subcommittee and to have a representative offer an oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and other tank lining companies presented arguments and evidence at the Code Committee meetings and at the WFCA annual conference. Nonetheless, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the same, and of denying Sessions access to the Article 79 subcommittee.

II.

ISSUES

This case requires that we address two issues: (1) Assuming Robbins committed no improprieties in his lobbying efforts, can his successful persuasion of the

WFCA constitute an antitrust violation under the Sherman Act? (2) If not, could the alleged improprieties by Robbins nonetheless state an antitrust claim? The first issue concerns the applicability of the *Noerr-Pennington* doctrine, and we find that *Noerr-Pennington* does apply in this context. The second concerns the applicability of that doctrine's "sham" exception, and we find that it too applies in this case, although only in a limited fashion.

III.

ANALYSIS

A. *Applicability of the* Noerr-Pennington *Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), defendants were a consortium of railroad interests that had successfully advocated legislation and executive action harmful to the emerging trucking industry. As here, plaintiff alleged that defendants' campaign had employed misrepresentations and other improper tactics. The first question addressed by the Court, however, was whether the Sherman Act prohibited the railroads' concerted lobbying efforts regardless of any improprieties: whether, that is, the lobbying itself was a "combination . . . in restraint of trade." 15 U.S.C. § 1.

The Court answered in the negative. The Sherman Act regulates "business activity," the Court held, not "political activity." 365 U.S. at 137, 81 S.Ct. at 529. The Court supported its conclusion with references to the constitutional right of petition, the value of public input

into the political process, and legislative intent. *See id.* at 137-40, 81 S.Ct. at 529-31.

In subsequent cases, the Court has made clear that *Noerr* applied to the petitioning of all governmental bodies. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965). In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. If *Noerr-Pennington* does *not* apply here, then Joor could potentially be liable in antitrust simply for bringing to the WFCA's attention true and persuasive information about the safety hazards of a competitor's product – if Joor did so in combination with others or in an attempt to monopolize.

We hold that *Noerr-Pennington* applies. It immunizes proper lobbying – either singly or in combination with others – of a private association engaged in promulgating an important model code to influence legislative and executive decisions.

Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

1. *Constitutional interests.*

Noerr-Pennington exists in large part to protect the constitutional right to petition the government. *Noerr*, 365 U.S. at 138, 81 S.Ct. at 530; *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). Joor argues that the WFCA is in effect a "governmental" body exercising legislative or quasi-legislative powers. Sessions emphasizes the WFCA's formally private status. The labels "governmental" and "private" are, however, of limited utility.

Petitioning, for constitutional purposes, is not confined to entreating the government directly for relief. *See, e.g., Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7, 84 S.Ct. 1113, 1117, 12 L.Ed.2d 89 (1964) (right to petition courts extended to workers' cooperative plan to advise one another of legal rights). Instead it encompasses appeals to some who are not governmental actors but who are nevertheless involved in the political process. Courts have repeatedly construed *Noerr-Pennington* in this manner.

In *Noerr* itself, an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion. The Court held that the railroads' "publicity campaign to influence governmental action falls clearly into the category of political activity" shielded from antitrust liability. 365 U.S. at 140-41, 81 S.Ct. at 531. We have applied *Noerr-Pennington* to an advertising campaign designed to influence a state's voter initiative process. *See Subscription T.V., Inc. v. Southern Cal. Theatre Owners Ass'n*, 576 F.2d 230, 232 (9th Cir. 1978). Finally, attempts to persuade private

parties to join in a commercial boycott have also received *Noerr-Pennington* protection where the boycott was part of an effort to procure governmental action. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 913-15, 102 S.Ct. 3409, 3425-26, 73 L.Ed.2d 1215 (1982); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1314 (8th Cir.), *cert. denied*, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 49 (1980).

So too, Joor's efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. *See Federal Prescription Serv. Inc. v. American Pharmaceutical Ass'n*, 471 F.Supp. 126, 130 (D.D.C. 1979) (Gesell, J.) (efforts to induce private medical associations to adopt favorable position protected under *Noerr* as "indirect attempts to influence governmental behavior"), *aff'd*, 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied*, 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982). The WFCA, whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process of the western states. The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the WFCA's decisions.

Moreover, the right to petition is not the only First Amendment guarantee on which *Noerr-Pennington* rests. Rights of association are also implicated. *See California Motor Transport*, 404 U.S. at 510, 92 S.Ct. at 611; *see also Claiborne*, 458 U.S. at 911, 102 S.Ct. at 3424 (rights of association and petition are inseparable). Joor was

undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958). Thus, First Amendment purposes would be served by extending *Noerr-Pennington* to the circumstances of this case.[3]

2. *Political Process Interests.*

Noerr-Pennington also promotes the effective operation of our political processes. *See City of Lafayette*, 435 U.S. at 399, 98 S.Ct. at 1129; *In re Airport Car Rental Litigation*, 693 F.2d 84, 86 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983). As the Court saw it in *Noerr*, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 365 U.S. at 137, 81 S.Ct. at 529. Hence the result in *Noerr* was deemed necessary in order not to "deprive the government of a valuable source of information." *Id.* at 139, 81 S.Ct. at 530. This concern too is applicable here.

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[3] By itself, however, this conclusion does not end the inquiry into either *Noerr's* applicability or Joor's liability. Antitrust law often impinges on First Amendment interests. Boycotts include an associational component, and an agreement to fix prices may of course be speech. Nonetheless, these activities can in certain circumstances be prohibited. The Sherman Act necessarily presupposes that the "right of business entities to 'associate' to suppress competition may be curtailed." *Claiborne*, 458 U.S. at 912, 102 S.Ct. at 3425; *see National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 697, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978).

Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. *See Wheeling-Pittsburg Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 838 (N.D. Ill. 1983). It follows that the WFCA renders valuable civic services and that the information it receives is quite important in the legislative process.

Within the WFCA, the various committees and subcommittees depend largely on the input of commercially self-interested parties for the expertise and research necessary to an informed decision. Self-interested information may be biased information, but "it is quite probably people with . . . a hope of personal advantage who provide much of the information upon which governments must act." *Noerr*, 365 U.S. at 139, 81 S.Ct. at 530. No one seriously assumes otherwise. The policy interests emphasized in *Noerr-Pennington* require that "free-flowing communication" be encouraged at all levels of governmental decisionmaking. *See Airport Car Rental Litigation*, 693 F.2d at 86. This policy also points in favor of *Noerr-Pennington's* applicability here.

3. *Statutory considerations.*

Finally, *Noerr-Pennington* rests on sound statutory grounds. To prevail under the Sherman Act, a plaintiff

must not only show an unlawful restraint of trade, but also prove that the defendant is legally responsible for this restraint. The Sherman Act was not intended to make private parties liable, in the ordinary case, for governmental acts. Thus where the alleged restraint of trade "was the act of a public official who is not claimed to be a co-conspirator," a private defendant is not ordinarily liable for any damages caused thereby. *Pennington*, 381 U.S. at 671, 85 S.Ct. at 1594. A leading antitrust treatise has expressed this aspect of *Noerr-Pennington* in terms of "proximate cause":

> private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening "cause" that breaks the link between a private party's request and the plaintiff's injury.

P. Areeda & H. Hovenkamp, *Antitrust Law* 4 (Supp. 1986).[4] Within our own circuit, Judge Schwarzer has also emphasized this point. *See In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 574 (N.D. Cal. 1981) ("if plaintiff suffered injury, it resulted from the acts of public officials . . . not the joint action of defendants"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983).

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[4] *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 123 (1985) ("In the absence of egregious conduct, a governmental decision favorable to the petitioner will negate the proximate causation of any competitive injury.").

These considerations apply here. The Article 79 amendment as initially proposed by Joor's president and later accepted by the entire WFCA had no legal force and little injurious effect until it was adopted by local legislatures or enforced by local fire officials. Absent improprieties in the lobbying process, the acts of these governmental officials should not make Joor liable to Sessions under the Sherman Act. *See Noerr*, 365 U.S. at 135-36, 81 S.Ct. at 528 (lobbying not actionable under Sherman Act because private parties not responsible for governmental restraints of trade).

For all the foregoing reasons, we conclude that *Noerr-Pennington* applies to Joor's lobbying efforts within the WFCA.

B. *Applicability of* Noerr-Pennington*'s "Sham" Exceptions*

Sessions alternatively contends that Joor's conduct fell within the "sham" exception to the *Noerr-Pennington* doctrine. Robbins, Sessions alleges, deprived Sessions of meaningful access to the Article 79 subcommittee, conspired with various public fire officials, and misrepresented facts both inside and outside the WFCA. The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process," *Clipper Exxpress v. Rocky Mtn. Mot. Tariff Bur., Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983); *Rodgers v. FTC*, 492 F.2d 228, 232 n. 6 (9th Cir.), *cert. denied*, 419 U.S. 834, 95 S.Ct. 60, 42 L.Ed.2d 60 (1974), corrupting the WFCA's decision.

Before turning to each of appellant's allegations concerning Joor's abuse of the WFCA's process, a recent decision of the Second Circuit must be considered.[5]

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[5] We must also dispose of a preliminary objection. Joor succeeded in its efforts to amend the Code and thus local fire safety laws. It claims, therefore, that its petitioning was "genuine" and cannot be called a "sham." Not so.

To be sure, the clearest examples of sham petitioning are those in which the defendant's aim was to harm a competitor directly, not through the governmental process that he purported to invoke. *See, e.g., Energy Conservation, Inc. v. Heliodyne*, 698 F.2d 386, 389 (9th Cir. 1983) (baseless lawsuit allegedly designed to cause competitor expense and to generate adverse publicity). Perhaps because the term "sham" suggests this sort of situation, courts have sometimes asserted the mistaken proposition for which Joor contends. *See, e.g., WIXT Television, Inc. v. Meredith Corp.*, 506 F.Supp. 1003, 1032 (N.D.N.Y. 1980) ("by definition a successful claim cannot be 'sham' ").

But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means. See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993-94 (9th Cir. 1979), (infringement suit based on fraudulently obtained patent is in "bad faith" and thus actionable in antitrust despite *Noerr*), *cert. denied*, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972) (misrepresentations inducing decision by administrative tribunal are actionable); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168, 179 & n.19 (D. Del. 1979). In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus defendant's "success or failure" is "one indicator" of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), but it is not dispositive.

Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous – rather than

1. *The Second Circuit case.*

The Second Circuit recently held *Noerr-Pennington* inapplicable in a case involving a model code association much like the WFCA. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 943 (2d Cir. 1987). Superficially, *Indian Head* is contrary to our resolution of the first issue. In fact, however, our difference with the Second Circuit is not so deep as it might appear.

In *Indian Head*, defendant enrolled over 150 new members – most of whom were defendant's employees or agents – into the association and thereby won a pivotal vote by a slim majority. *Id.* at 940-41. The court found that *Noerr-Pennington* did not protect such conduct. We agree with this result; we do not agree, however, that the *Noerr-Pennington* doctrine is generally inapplicable to "model code association" cases.

The essential flaw in the Second Circuit's analysis, as we see it, is that the court conflated the question of whether *Noerr-Pennington* applied with the distinct question of whether its "sham" exception was also applicable:

> Simply put, [defendant's] conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*: rather, its conduct was a subversion of the legitimate purposes of the [model code association].

Indian Head, 817 F.2d at 945. Although we think the Second Circuit correctly denied immunity in *Indian Head*, the

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unethical – petitioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams. *See* Hurwitz, *supra* note 4, at 109.

proper analysis of such "subversion" should focus on the applicability of *Noerr-Pennington's* exceptions.

In saying this we recognize that the court in *Indian Head*, by restricting *Noerr-Pennington* to direct petitioning of the government, simplified the law by reducing drastically the scope of the "sham" exception. On the other hand, it complicated the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating non-members. It is unlikely that this exchange will result in a net simplification.[6]

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[6] A few other observations with respect to the *Indian Head* case may be helpful. The Second Circuit stressed that private bodies, unlike governmental actors, cannot be assumed to be acting in the public interest. *See* 817 F.2d at 943-44. True or not, this point overemphasizes the policy aspect of the *Noerr* doctrine at the expense of its other components. The court gave short shrift to antitrust defendants' petitioning rights in situations where they had not "subverted" the organization's code-promulgating process, and it made no mention at all of their associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe: "The 'objective validity' of a restraint of trade has never been a defense to an antitrust charge. . . . " *Id.* at 947. Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

2. *Exclusion from the Article 79 Subcommittee.*

Sessions argues that it was denied meaningful access to the WFCA because it had no voting representative on the Article 79 subcommittee. Although denial of access to a decisionmaking tribunal can provide grounds for a "sham" exception claim, *see California Motor Transport*, 404 U.S. at 511-12, 92 S.Ct. at 612, there can be no such claim here. Even if Sessions had a valid claim based on exclusion from the subcommittee, it has offered no evidence that Joor, rather than the WFCA, was responsible for this exclusion.

3. *Conspiracy.*

Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *See Clipper Exxpress*, 690 F.2d at 1252 n.17; *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). Sessions introduced evidence below showing that Joor routinely entertained WFCA members and other local fire officials and provided them with certain "promotional gifts" such as coffee mugs and tape measures. The district court concluded, however, that this evidence failed to raise a triable issue of conspiracy. We agree.

Joor's efforts to curry favor with WFCA members may have been somewhat indelicate, but they provide no evidence of any unlawful agreement. *See Metro Cable Co. v. CATV, Inc.*, 516 F.2d 220, 230-31 (7th Cir. 1975) (on

motion to dismiss) (allegations of campaign contributions, even if true, do not provide basis to withhold *Noerr-Pennington* immunity). Sessions, it develops, has offered no "specific factual support of the allegations of conspiracy," which this court requires for summary judgment purposes. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980).

We must acknowledge, however, that the fact that Robbins sat on the very subcommittee that launched the amendment so favorable to Joor is unsettling. The spectre raised by this circumstance is that a body ostensibly devoted to the public good – and possessed of considerable power because of this reputation – may have been "captured" by particular private interests. *See generally* Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv.L.Rev. 713 (1986). Private standards-setting associations are particularly vulnerable to this sort of abuse. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571, 102 S.Ct. 1935, 1945, 72 L.Ed.2d 330 (1982). In essence this was the situation in *Indian Head*, where certain steel interests "took over" the model code association on the eve of a critical vote by enrolling hundreds of new members drawn from their own ranks. Such conduct constitutes exactly the kind of abuse of process that the "sham" exception to *Noerr-Pennington* serves to weed out.

Despite the fact that Robbins' position on the Article 79 subcommittee creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined to capture the WFCA. Sessions has not alleged that anyone on the subcommittee other than Robbins had a financial interest in the proposed amendment. Nor has Sessions offered

evidence that Robbins in fact exerted an improper influence over any WFCA members or exercised improper control over WFCA procedures or voting. The entire WFCA membership, consisting exclusively of public officials, had final authority to accept or reject the proposed amendment, and Sessions has provided us with no reason to doubt their integrity.[7]

4. *Misrepresentation.*

The gravamen of Sessions' accusations of impropriety is that Joor persuaded the WFCA by the use of deceptive material. In particular, Sessions challenges a letter that Robbins submitted to the Article 79 subcommittee in which he summarized his objections to the underground tank lining process. Robbins wrote that:

> [T]wo certainties exist:
>
> 1. When leakage is encountered, weakened metal exists, and,

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[7] If the WFCA were an association of private interests putatively engaged in self-regulation, Sessions would have a very different antitrust claim. Joor's liability would probably not be altered, but the WFCA as a whole might then be subject to suit. *Cf. National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (engineers' association was liable in antitrust for taking position that competitive bidding was unethical); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) (allegations that gas producers' and sellers' association had with anticompetitive intent refused to approve and to service plaintiff's product stated antitrust claim). But Sessions has not sued the WFCA as a whole, nor impugned the integrity of its ultimate decisionmaking process.

2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.

Acceptance of tank lining, as is being proposed, implies the discarding of UL 58 or equivalent strength requirements.

Excerpt of Record (E.R.) at 702-03.

According to Sessions, all three of these representations were false. First, there may be no weakness in the metal of a leaking tank. Second, ultrasonic testing can accurately measure the thickness of the tank walls while the tank is still underground. Finally (still according to Sessions), Robbins' conclusion falsely suggests that tank lining somehow repudiates or voids the tank's UL label of approval.[8] The UL label indicates only that the tank in its original condition satisfied certain wall thickness specifications, and lining a used tank has no effect on its continuing ability to satisfy those requirements. Sessions later procured a letter from UL confirming this position. *See* E.R. at 309.

The district court concluded, however, that Robbins' statements were not deceptive, but "simply part of a reasoned argument." E.R. at 703. The district court said that "Joor may have been wrong, [but] it is clear that the WFCA could not have been misled by what Joor said." *Id.*

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[8] UL – short for Underwriters Laboratories – is a private, nonprofit corporation that establishes standards and specifications for products in a wide variety of industries. The UL label on a product indicates that it meets the relevant standards. The parties agree, and the district court found, that UL approval "is essential to the successful marketing of a product." E.R. at 695.

It is possible that the district court's conclusion was, for summary judgment purposes, erroneous. If Robbins was "wrong" in his letter, the Article 79 subcommittee may well have been misled. And there is evidence that it was. The minutes from the meeting at which the subcommittee voted to accept Joor's amendment reflect an acceptance of the erroneous idea described above: "The committee was unanimous in their disapproval of cutting an opening in a tank *and thus destroying the integrity of the UL approval* to proceed with the lining process." E.R. at 580 (emphasis added).

Misrepresentations, however, do not necessarily destroy *Noerr-Pennington* immunity. An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing legislative – as opposed to adjudicative – action. *Clipper Exxpress*, 690 F.2d at 1261; *see California Motor Transport*, 404 U.S. at 513, 92 S.Ct. at 613; *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984); *Metro Cable*, 516 F.2d at 228 (7th Cir. 1975).

Sessions, however, argues that the WFCA is not a legislative body. Perhaps so, but it was legislative action that both Sessions and Joor sought. Moreover, the WFCA was an indispensable part of the "political arena." *California Motor Transport*, 404 U.S. at 513, 92 S.Ct. at 613. In *Noerr* the Court refused to hold that alleged misrepresentations in a publicity campaign designed to influence legislation were actionable under the Sherman Act. Such conduct fell "clearly into the category of political activity." 365 U.S. at 140-41, 81 S.Ct. at 531. That principle controls this case.

Although the issue is a close one, we hold that that principle does not extend to Joor's alleged misrepresentations made *outside* the WFCA lobbying process, *before* the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. The record suggests that these officials were induced to believe that tank lining would "void" the UL label or that tank lining was already prohibited by the Code. *See* E.R. at 232-33. In one case at least, Sessions claims to have evidence that it was Robbins himself who persuaded officials to deny Sessions a permit. *See* E.R. at 660.

Misrepresentations made to an executive official fall between the clear rules established in the legislative context (where misrepresentations are *not* actionable) and the adjudicative context (where they *are* actionable). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* 44 (Supp. 1986). Application of these distinctions is not easy. Executive officials may administer the law, adjudicate claims under the law, or, by framing policy, make law. The lines between the executive, legislative, and judicial function are often quite indistinct. Careful case-by-case analysis is necessary. Where the executive action sought was more a matter of *administering* than of *making* law, misrepresentations inducing the governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine. *Cf., e.g., Woods Exploration & Producing Co. v. Aluminum Co.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971)(misrepresentations before state natural gas commission inducing decision under set allocation formulae held unprotected by *Noerr*), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d

736 (1972); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168, 178 (D. Del. 1979).[9]

Here, if Sessions' allegations are true, the fire officials were asked to respond in an administrative capacity. These officials were asked to deny Sessions its permit either because tank lining violated UL standards or because it violated the Code. This would be a clear instance of administering extant, established standards. We hold that these allegations state a limited "sham" exception claim. To succeed, Sessions must show that Joor's misrepresentations – and not any independent factors – caused the fire officials to act. In addition, it must prove all the other elements of a Sherman Act violation before it is entitled to antitrust damages.

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[9] In *Noerr* itself, defendants had allegedly made misrepresentations to induce executive action. *See* 365 U.S. at 129-30, 81 S.Ct. at 525. Defendants apparently sought an executive decision to enforce existing law *more strictly*. *See id.* at 131, 81 S.Ct. at 526. That is the kind of policy decision our analysis would probably exclude from the reach of the "sham" exception. In any event, a more recent Supreme Court opinion has clearly established that a person's petitioning immunity does not protect him from at least some deliberate misrepresentations made in pursuit of executive action. *See McDonald v. Smith*, 472 U.S. 479, 484, 105 S.Ct. 2787, 2790, 86 L.Ed.2d 384 (1985) (letter sent to president defaming plaintiff, a nominee for United States attorney, was not immunized by defendant's right of petition and was actionable in libel). Because such misrepresentations also fail to serve *Noerr's* policy or statutory interests, we see no reason to immunize them in antitrust if they are not to be immune in libel. *See* Hurwitz, *supra* note 4 at 83-84; *see also McDonald*, 472 U.S. at 484, 105 S.Ct. at 2791 (citing antitrust precedent in support of its holding).

The cause of action left to Sessions is a narrow one. Any misrepresentations made by Joor in pursuit of its legislative goals are fully protected under *Noerr-Pennington*. In addition, any injury to Sessions caused by the actual amendment to the Code – whether through governmental or private action in reliance thereon – provides no basis for an antitrust action against Joor. To this extent we fully affirm the summary judgment granted below. We reverse and remand only in order that Sessions be allowed to prove, if it can, injury caused by Joor's misrepresentations to fire officials in their administrative capacity.[10]

AFFIRMED in part; REVERSED and REMANDED in part.

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[10] Sessions may of course also attempt to prove that Robbins made misrepresentations to *private* parties not in pursuit of its governmental aims, but rather to harm the tank lining industry directly. The antitrust actionability of such conduct – regardless of Robbins' position on the Article 79 subcommittee – was established in *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). Sessions may also proceed with its state law claims, which were not involved in this appeal.

487 U.S. 1213, 108 S.Ct. 2862

SESSIONS TANK LINERS, INC., dba Southwest Tank Liners, Inc., petitioners, v. JOOR MANUFACTURING, INC. No. 87-687.

Case below, 827 F.2d 458.

June 27, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988).

Opinion on remand, 852 F.2d 484.

SESSIONS TANK LINERS, INC. dba Southwest Tank Liners, Inc., Plaintiff-Appellant,

v.

JOOR MANUFACTURING, INC., et al., Defendants-Appellees.

Nos. 86-6208, 86-6470.

United States Court of Appeals,
Ninth Circuit.

July 22, 1988.

On Remand from the Supreme Court of the United States.

Before SNEED, BOOCHEVER and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

This case was before this court previously, 827 F.2d 458 (9th Cir. 1987). Petitions for writ of certiorari were filed in the Supreme Court of the United States. These petitions were remanded to us for further consideration, ___ U.S. ___, 108 S.Ct. 2862, ___ L.Ed.2d ___ in the light of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ___, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988).

After examining *Allied Tube & Conduit Corp.* carefully, it is clear that we must remand this case to the district court for further proceedings. The Supreme Court explicitly rejected the approach this court adopted in its disposition of this case. *Id.* at ___ n.10, 108 S.Ct. at 1941 n. 10. The Supreme Court has made clear that the context and

nature of the efforts of Joor Manufacturing, Inc. to influence the Western Fire Chiefs Association (WFCA) to amend its influential fire code must "be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process." *Id.* at ___, 108 S.Ct. at 1942.

Although the Supreme Court did not establish a bright line rule, it did state:

> Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no [*Eastern Railroad Presidents Conference v.*] *Noerr* [*Motor freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)] immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

Id.

It is our belief that further proceedings in the district court are necessary to determine the extent to which Sessions Tank Liners, Inc. has established an antitrust violation on the part of Joor Manufacturing, Inc.

REMANDED.

SESSIONS TANK LINERS, INC., d/b/a Southwest Tank Liners, Inc., Plaintiff,

v.

JOOR MANUFACTURING, INC., SCM Corporation d/b/a Glidden Coatings and Resins, and Does 1 through 10 inclusive, Defendants.

No. CV 84-6363 MRP

United States District Court, C.D. California.

Dec. 11, 1991.

Blecher & Collins, Maxwell M. Blecher, Donald [sic] C. Hsu, Donald R. Pepperman, Los Angeles, Cal., for plaintiff.

Farella Braun & Martel, Jerome I. Braun, George H. Kalikman, San Francisco, Cal., Lorenz Alhadeff Lundin & Oggel, Robert D. Rose, San Diego, Cal., for defendants.

OPINION

PFAELZER, District Judge.

In 1981, the Western Fire Chiefs Association ("WFCA") adopted a Uniform Fire Code ("UFC") provision which in effect banned tank lining. The adoption of the provision and the events leading to its adoption adversely affected the business of plaintiff Sessions Tank Liners, Inc. ("Sessions"). In this action, Sessions charges

the defendant Joor Manufacturing, Inc. ("Joor") with a violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1988), on account of Joor's role in these events and the adoption of the model fire code provision. Sessions claims, in addition, that Joor intentionally interfered with its prospective economic advantage.

This case is before the Court on remand from the Ninth Circuit, *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 852 F.2d 484, 485 (9th Cir. 1988) (*"Sessions III"*), to determine whether Joor's efforts to influence the WFCA's code-promulgating process are immune from antitrust liability under the doctrine established by the Court in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (*"Noerr"*), *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (*"Pennington"*), and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), as interpreted by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (*"Allied"*), and if not, whether Joor is liable under § 1.

The Court, having conducted a bench trial, concludes that (1) the defendant's actions are not shielded from antitrust liability by the *Noerr-Pennington* doctrine, (2) the defendant violated § 1 of the Sherman Act, 15 U.S.C. § 1, and (3) the defendant interfered with plaintiff's prospective economic advantage.

FACTS

Joor manufactures and sells tanks for the underground storage of hazardous fluids such as gasoline. Sessions, also known as Southwest Tank Liners, Inc., repairs leaking storage tanks by cutting an opening in them, lining the interior with a protective coating of epoxy, and resealing them.[1] This method of repair does not require that the tank be removed from the ground.

Sessions and Joor compete in the marketplace for customers, such as service station owners, who own a leaking tank but require an impermeable one. While the cost of lining an old tank is roughly equivalent to the cost of purchasing a new one, customers often prefer to line their tanks because tank replacement involves the additional cost of the labor necessary to remove and discard the old tank and to install the new one. Moreover, tank replacement often requires a lengthy interruption of business.

In August 1981, the WFCA – a private, non-profit, standard-setting association whose voting membership is limited to public fire officials – adopted its 1982 version of the UFC. The 1982 UFC included a provision, § 79.601(d), which required that leaking tanks either be removed from the ground or abandoned. Although the provision did not have the force of law, the UFC is a

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[1] Sessions, which lined tanks in California and in other western states, is one of approximately 30 licensed applicators of Glass Armor epoxy in the United States. Glass Armor is produced by the Bridgeport Chemical Company, located in Florida.

highly influential code. Many local governments in California and in other western states ultimately adopted the UFC; and, in localities within these states where the UFC was not enacted as law, public fire officials frequently enforced the Code's provisions on their own, refusing to issue permits for the underground lining of leaking tanks.[2] Joor's president and owner, Howard Robbins ("Robbins"), was a member of the WFCA subcommittee which drafted UFC § 79.601(d).

In the period of time relevant here, the WFCA enacted UFC provisions such as § 79.601(d) through a three-tiered process. First, subcommittees were established to examine fire-related issues and to draft proposed code provisions based on their findings.[3] These subcommittees were generally made up of public fire officials, private industry representatives, and members of other standard-setting organizations, all of whom had the right to vote on subcommittee matters. After a subcommittee completed its work, its proposals were published in two trade journals. The suggested revisions were then reviewed by the Uniform Fire Code Committee – a committee of public fire officials – at its annual meeting. The UFC Committee did not carefully review each proposed amendment, but gave consideration only to those which were the subject of an objection at the

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[2] Both parties agree that at some point, a number of local governments adopted the UFC as law. Neither party, however, presented evidence of any specific governmental adoption of the code. The plaintiff did present evidence that public fire officials in designated areas routinely enforced the UFC ban on the lining of leaking tanks by denying permits to plaintiff.

[3] Individuals could also propose code changes.

annual meeting by a member of the subcommittee which drafted the change.[4] Absent an objection to a proposal, the UFC Committee voted to recommend it for approval to the WFCA. After the UFC Committee meeting, proposed code changes were published in trade journals with the recommendations of the UFC Committee attached. The full body of the WFCA then voted on the proposed revisions at its annual meeting. Given the number of proposed changes, the length of those changes, and the brevity of the WFCA meeting, it was not contemplated that the WFCA would reexamine every proposal for revision. Like the UFC Committee, the WFCA generally adopted subcommittee revisions unless an objection arose at the WFCA meeting.[5] If a majority of the WFCA approved a proposed change, the change became part of the UFC. The WFCA revised its code every three years.

In December 1979, Joor's president Robbins volunteered to work on the subcommittee of the UFC Committee charged with revision of Article 79 of the UFC ("Article 79 subcommittee"), and began to attend its meetings. This subcommittee's assignment was to rewrite the 1979 version of Article 79, which established guidelines for the storage and handling of flammable liquids.

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[4] However, the UFC Committee meetings were open to the public; and, in theory, any person could object to a proposed code change.

[5] This meeting, like the UFC Committee meeting, was open to the public. While members of the public could not vote on UFC changes, they could express support for or opposition to any proposal under consideration.

The purpose of the revision was to make Article 79 consistent with rules established by the National Fire Protection Association ("NFPA"), another private standard-setting organization. The UFC delegated the task of rewriting Article 79 to the subcommittee because the fire officials in the UFC Committee and the WFCA had neither the time nor the technical expertise to draft and revise this section themselves. The subcommittee, in turn, directed Robbins to integrate UFC and NFPA provisions which related specifically to the depth and location of underground storage tanks. Neither the 1979 UFC nor the NFPA rules addressed tank lining or required the removal of leaking tanks from the ground.

The subject of tank lining did not arise in the Article 79 subcommittee until the afternoon of its final meeting on March 17, 1981. There are no agendas, minutes or drafts of revisions prior to March 17, 1981 which refer to tank lining or indicate that tank lining was a subject under consideration or discussion. Moreover, at trial, no study of tank lining was ever produced or referred to as having been the subject of discussion by the Article 79 subcommittee at any time. Although individual members of the subcommittee testified that they talked about tank lining among themselves or with other fire officials outside of the subcommittee, the subcommittee as a body addressed tank lining only on this one occasion. At this March meeting, representatives of Sessions and of Bridgeport Chemical Company were scheduled to deliver a presentation on the tank lining process.[6] However, the

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[6] Sessions officials had requested an opportunity to speak before the subcommittee after learning that Robbins, who they

agenda for the meeting, dispatched to subcommittee members in advance, did not indicate that the subcommittee would either consider or vote on any code provision concerning tank lining.

In anticipation of the meeting, and in response to materials which Sessions distributed to the subcommittee, Robbins drafted a letter which was circulated to subcommittee members. Robbins had not been assigned by the subcommittee to address the subject of tank lining or to write this letter. In the letter, Robbins questioned the safety of the lining process and warned that the WFCA could be subject to liability for authorizing use of the process. Robbins did not deny that tank lining could prevent leaking. However, he argued that where there was leakage, there was weakened metal, and lining could not restore the structural integrity of a weakened tank. Even though it is an easily demonstrable fact that leaking tanks do not necessarily involve weakened metal, Robbins made this argument to cause the members of the subcommittee to believe that tanks that had been lined were in danger of structural collapse. Robbins did not reveal that relatively simple tests were available to measure the structural strength of a leaking tank in the ground in order to determine if it required replacement rather than repair. Representatives of Sessions were not provided with a copy of the Robbins' letter prior to their presentation to the subcommittee.

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knew was a competitor opposed to tank lining, was a member of the subcommittee.

On March 17, 1981, the tank lining proponents made a brief presentation to the Article 79 subcommittee, answered questions, and left the subcommittee meeting. Not having seen Robbins' letter, the proponents were not in a position to effectively refute his arguments. After their departure, Robbins vigorously advocated a UFC ban on tank lining, repeating the concerns he had expressed in his letter about the safety of the lining process. In addition, Robbins advised the subcommittee falsely that lining a tank would "void" the tank's Underwriters Laboratories ("UL") label and, in turn, subject the WFCA to liability.[7] At the time he made these statements to the subcommittee, Mr. Robbins knew that the UL certification attests to the product's safety at the time the tank leaves the factory, and nothing done to the tank thereafter has the effect of negating the certification.

Although the other subcommittee members were well aware of Robbins' economic interest in banning the underground lining of leaking tanks, they did not object to, counter or question Robbins' arguments. Rather, they testified that they considered Robbins, who had an engineering background, to be the technical expert of the group. Accordingly, they relied on what he told them about tank lining and did not feel the need to go further.

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[7] A UL label indicates that a product has been certified as safe by the Underwriters Laboratories testing program. The label certifies the safety of the product only when the product is new. At the time Robbins made his misrepresentation concerning the "voiding" of this label, the UL representative on the Article 79 subcommittee was not present.

Approximately one hour after the subject of tank lining was first raised in the subcommittee, Robbins made a motion to include in the revised Article 79 the provision which required the removal of leaking tanks from the ground. Robbins' motion passed unanimously. The minutes of the meeting reflect that the subcommittee's vote was predicated in part on Robbins' misrepresentation concerning the UL label.[8] The motion to prohibit the lining of leaking tanks passed as the last order of business of the Article 79 subcommittee.[9] Revised Article 79, the one-hundred page final work of the subcommittee, was then sent to the UFC Committee for consideration.

Because the fire officials on the UFC Committee and in the WFCA did not have the technical expertise to question the Article 79 subcommittee's proposals, review of these proposals was, as expected, perfunctory. In April 1981, the UFC Committee approved § 79.601(d) as drafted by the subcommittee. In fact, the UFC Committee made only a few changes to the whole of Article 79; and these changes were all made at the request of the Article 79

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[8] The minutes of the March 18, 1981 meeting read:

> The committee was unanimous in their disapproval of cutting an opening in a tank and thus destroying the integrity of the UL approval to proceed with the lining process. Other problems of external corrosion, loss of structural stability, corrosion of piping, etc., were discussed and it was agreed that such lining procedures should be prohibited unless the finished product will meet UL approval.

Exhibit 28.

[9] The proposed code change provided: "Leaking tanks shall be removed from the ground."

subcommittee members. The minutes of the UFC Committee meeting do not reflect any discussion on the subject of tank lining.[10] In August 1981, the WFCA followed suit.[11]

After the approval of UFC § 79.601(d) by the Article 79 subcommittee, but before adoption of it by the WFCA, Robbins sent letters to public entities, fire officials and other standard-setting organizations, as well as customer groups, advising them of the subcommittee's action. Fire officials in many jurisdictions, in turn, denied permits to Sessions in anticipation of the WFCA's final action. In that period, Sessions' business suffered a sharp decline. After the WFCA officially enacted the UFC, Sessions' business continued to suffer. While Sessions' business had been growing in the period 1973-1981, the business slumped in ensuing years.

In 1982 and 1983, the State of California enacted legislation which in effect approved and authorized tank lining, subject to certain conditions.[12] Nevertheless, Sessions' business did not recover.

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[10] The minutes indicate that Sessions' officials and Robbins were present at this meeting.

[11] In adopting the Article 79 subcommittee's recommendation, the WFCA altered the language but not the substance of § 79.601(d). The 1982 code provision read: "Leaking tanks shall be promptly emptied and removed from the ground or abandoned in accordance with Section 79.113." Exhibit 137.

The WFCA did not keep minutes of its annual meeting.

[12] The Boatwright Act, effective on January 1, 1983, provided in relevant part that no local agency could deny a permit to repair an underground storage tank "solely on the basis that the tank is to be repaired by an interior-coating process." Cal. Gov't Code § 53076 (West 1983).

The Sher Bill guaranteed the right of a tank-owner to repair a leaking underground tank once "by an interior-coating process"

PROCEDURAL HISTORY

Sessions filed this action on August 24, 1984, initially charging that Joor violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as state law.[13] In 1986, the Court granted partial summary judgment for Joor on the ground that the *Noerr-Pennington* doctrine shielded Joor's actions from antitrust scrutiny. Memorandum of Decision and Order Granting Summary Judgment of January 17, 1986, as modified by Order of April 7, 1986.[14] The Court

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under certain conditions. Cal. Health & Safety Code § 25284.5 (West 1983). In addition, the Sher Bill provided that the legislature intended to "preempt any local regulations of underground storage tanks." Cal. Health & Safety Code § 25288.1 (West 1983). The Sher Bill has since been amended, but the law continues to express the legislative intent to preempt local regulation.

[13] Plaintiff's complaint included claims for violations of the California Cartwright Act, unfair competition, tortious interference with contractual relations, tortious interference with prospective advantage, trade libel, and defamation. Defendant Joor alleged counterclaims for violations of the Lanham Act and intentional interference with contractual relations. Before trial, plaintiff abandoned its claim under Section 2 of the Sherman Act and its state law claims for defamation, unfair competition, and trade libel. Defendant abandoned its counterclaims. Pretrial Order of November 13, 1989. The complaint initially named a second defendant. Sessions voluntarily dismissed this defendant in March 1985.

[14] The Court initially granted summary judgment for defendant as to all of plaintiff's antitrust claims, and dismissed without prejudice plaintiff's state law claims. Order of January 17, 1986. The Court, however, subsequently reinstated plaintiff's complaint to the extent that it alleged "refusal to deal" claims as the *Noerr* doctrine did not apply to such claims. Order of April 9, 1986. The Court also reinstated plaintiff's state law claims at that time. *Id.* In modifying its initial order, the Court

certified its decision to the Ninth Circuit for interlocutory review. Order of June 6, 1986.

The Ninth Circuit, finding that *Noerr* protected the defendant's attempts to lobby the WFCA, affirmed as to most of the allegations in the complaint.[15] *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458 (9th Cir. 1987) ("*Sessions I*"). The United States Supreme Court, however, vacated the Ninth Circuit's decision and remanded to the Ninth Circuit for further consideration in light of *Allied. Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 487 U.S. 1213, 108 S.Ct. 2862, 101 L.Ed.2d 899 (1988). The Ninth Circuit, in turn, remanded to this Court. *Sessions III*, 852 F.2d at 485.

This Court conducted a bench trial to resolve the factual questions concerning Joor's role in the events

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did not alter its determination that the *Noerr* doctrine entitled defendant to summary judgment as to those antitrust claims relating to defendant's conduct in connection with the WFCA.

[15] The Ninth Circuit, however, concluded that Joor's alleged misrepresentations to fire officials "*outside* of the WFCA lobbying process, *before* the Code was amended" may have fallen within the "sham exception" to *Noerr* and accordingly remanded on this limited issue. *Sessions I*, 827 F.2d at 468-69.

While the *Noerr-Pennington* issue was pending before the Ninth Circuit, this Court granted summary judgment for the defendant as to the refusal to deal claims, *see* Note 14, *supra*, and again dismissed without prejudice the pendent state law claims. Order of March 23, 1987. Plaintiff appealed this ruling.

The Ninth Circuit declined to address the merits of this second appeal, remanding to this Court for reconsideration in light of its decision on the *Noerr-Pennington* issue. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, No. 87-5854 (C.D. Cal. Jan. 14, 1988) ("*Sessions II*"). This Court, in turn, vacated its Order of March 23, 1987. Order of March 21, 1988.

leading to the adoption of the code provision.[16] After trial, the Court determined the issues, in particular those of credibility, against Joor, and found for Sessions on the § 1 claim, as well as the claim for intentional interference with prospective advantage.[17]

DISCUSSION

I. *Claim Under § 1 of the Sherman Act*

A. Noerr-Pennington Immunity

Joor contends that, under the *Noerr-Pennington* doctrine, it is immune from antitrust liability for urging the WFCA to adopt UFC § 79.601(d). This doctrine shields from antitrust scrutiny concerted efforts to restrain or monopolize trade by petitioning government officials. *Allied*, 486 U.S. at 499, 108 S.Ct. at 1936. The doctrine applies to attempts to influence legislative, executive, judicial, and administrative decisionmaking. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (judicial); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d

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[16] Prior to trial, defendant Joor again moved for summary judgment, claiming that plaintiff had not presented sufficient evidence to support its antitrust claims. The Court denied this motion. Order of August 17, 1989.

[17] There are two additional state law claims brought by Sessions which require disposition. The California Cartwright Act claim does not appear to have been seriously urged as a ground of recovery at trial and, in any event, any damages awarded on this theory would duplicate those awarded and trebled under § 1. The claim for tortious interference with contractual relations was not proved by Sessions.

642 (1972) (administrative); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (executive); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (legislative).

In addition, *Noerr* may also protect from liability lobbying activity directed towards a private standard-setting association which is incidental to an effort to influence governmental action. *Allied*, 486 U.S. at 502-03, 108 S.Ct. at 1938-39. In *Allied*, the Supreme Court reached this conclusion in recognition of the fact that petitioning a private association may often be the most effective means of influencing legislation; for local governments, lacking the resources and the expertise to second-guess standards established by nonpartisan private organizations, routinely adopt those standards as law. However, not every concerted effort genuinely intended to influence governmental action is immunized by *Noerr*. *Id.*

The *Allied* Court formulated a test to determine when attempts to influence a private standard-setting process would receive *Noerr* immunity – a test more easily articulated than applied.[18] Under this test, a party who petitions a private association for the adoption of an anticompetitive standard is immune from liability flowing from the effect the standard has in the marketplace

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[18] As Judge Sneed pointed out, the type of analysis adopted by the Second Circuit in *Allied* requires "that the antitrust law develop the permissible practices of model code associations, their members and participating non-members." *Sessions I*, 827 F.2d at 465.

(independent of government action) if the party's lobbying is "a valid effort to influence governmental action." *Id.* at 502, 108 S.Ct. at 1938 (emphasis added). Not all efforts are "valid" irrespective of the apparent legitimacy of their aim. Thus, *Noerr* immunity "depends not only on the impact, but also on the context and nature of the activity." *Id.* at 504, 108 S.Ct. at 1940. Applying this test in *Allied*, the Court held that "where . . . an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace." *Id.* at 509-10, 108 S.Ct. at 1942. The *Allied* court counseled that, in determining whether *Noerr* immunity is applicable, courts must distinguish between "activity involving the exercise of decisionmaking authority and market power" which is not protected, and "mere attempts to persuade an independent decisionmaker" which are protected. *Id.* at 510 n.13, 108 S.Ct. at 1942 n. 13.

The *Allied* test mandates an intensely factual inquiry. A defendant is not entitled to *Noerr* immunity merely because the defendant has complied with the procedural rules of a private association. "An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards." *Id.* at 509, 108 S.Ct. at 1942. Similarly, the fact that an association's rules reserve decisionmaking authority to nonpartisan and financially disinterested members is not dispositive. *Allied* requires a court to scrutinize the standard-setting process and to determine whether an economically interested defendant has manipulated that

process in such a manner that it would be more accurate to say that the defendant – rather than a nonpartisan private association – "exercised decision making authority" in the adoption of the alleged restraint of trade.[19]

In *Allied*, it was readily apparent that an economically interested defendant had usurped a private association's decisionmaking power. The defendant packed a private standard-setting body with new members whose only function was to vote against a code provision authorizing the use of a competitor's product. In this case, although Joor's anticompetitive activity was not so blatant, the Court nevertheless has no difficulty in reaching the same conclusion as that reached in *Allied*. Joor is not entitled to *Noerr* immunity from any liability stemming from the effect UFC § 79.601 has of its own force in the marketplace.

It cannot be disputed that Joor was "economically interested" in the enactment of the model fire code provision requiring the removal of leaking tanks from the ground. The provision effectively banned the underground lining of leaking tanks, and forced their owners to purchase new tanks from manufacturers like Joor rather than repair their old ones. In addition, it is clear that Joor, through Robbins, "exercised decisionmaking authority"

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[19] In this respect, *Allied* is contrary to the cases applying the *Noerr* doctrine to direct efforts to influence legislative action. Where a private party petitions a legislative body, courts will refuse to deconstruct the decisionmaking process to ascertain whether the legislature's action was truly independent or instead the product of coercion or manipulation by a private party. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991).

in the formulation and adoption of UFC § 79.601(d). Joor exercised such authority both within the Article 79 subcommittee and, because of the way the model code-making process worked, within the framework of the entire WFCA.

In the subcommittee, Robbins essentially took over the decisionmaking process in the formulation of § 79.601(d). Robbins took advantage of his position as a subcommittee member and his knowledge of the subcommittee's procedures to secure the inclusion of § 79.601(d) in the subcommittee draft. First, aware that he was considered the most technically competent person on the subcommittee and that his colleagues relied on his advice on engineering issues, Robbins presented a partisan portrait of tank lining. He articulated all of the potential dangers associated with lining, but neglected to discuss the availability of tests to ensure that lining would be perfectly safe. Second, Robbins made knowingly false statements to the subcommittee, telling them that the lining process would "void" the UL label. Third, Robbins drafted the language of § 79.601(d) and moved the subcommittee to approve it. Fourth, Robbins prevented proponents of tank lining from fully and effectively articulating their contentions regarding the lining process to the subcommittee. He did not make his arguments known to the proponents of tank lining who were scheduled to speak to the subcommittee on March 17, 1981. The proponents were not provided with a copy of the Robbins' letter which set forth specific arguments against the tank lining process. They did not know what arguments he had made, so they obviously had no chance to

rebut them. Moreover, Robbins waited until the conclusion of the final subcommittee meeting and until after the proponents of tank lining departed to propose § 79.601(d); as a result, the provision was not really debated at all in the subcommittee. Finally, Robbins made the motion despite the fact that neither the subcommittee members nor the tank lining proponents had been notified that a vote on the issue would be taken.[20]

Taken together, these factors demonstrate beyond question that Joor, through Robbins, rather than a neutral subcommittee, was responsible for the inclusion of § 79.601(d) in the subcommittee draft. As the minutes of the March 18, 1981 meeting reflect, the subcommittee voted for the provision solely on the basis of Robbins' statements, including the misrepresentations that he made.

It is argued, however, that the final decision to include § 79.601(d) in the UFC was made by the WFCA, and then only after review by the entire body. Therefore, the decision to impose the restraint contained in § 79.601(d) was not made by Joor, but by the WFCA. In evaluating whether Joor also exercised decisionmaking authority with respect to § 79.601(d) within the WFCA itself, it is helpful to look by way of analogy to the state action doctrine. In *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 314, 87 L.Ed.315 (1943), relying on principles of federalism and state sovereignty, the Court held that anticompetitive restraints imposed by the state "as an act

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[20] Not all members of the subcommittee were present for the March 17 vote.

of government" are exempt from liability under the Sherman Act. In subsequent cases, the Court has recognized that *Parker's* federalism rationale requires that the state-action exemption apply in suits against private parties where those parties act at the direction of the state. *Patrick v. Burget*, 486 U.S. 94, 99-100, 108 S.Ct. 1658, 1662-63, 100 L.Ed.2d 83 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). In cases in which a private party raises a state-action defense, a court must address essentially the same question as the court is required to examine here: whether a nonpartisan entity or an economically interested private person was responsible for an anticompetitive restraint. *See* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 Harv.L.Rev. 667, 687 (1991). The approach taken in these cases is instructive in analyzing the facts of this case.

The Supreme Court has developed a rigorous two-prong test to determine whether anticompetitive conduct by private parties should be deemed to be at the direction of the state. Under this test, " 'the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," ' " and "the anti-competitive conduct 'must be "actively supervised" by the State itself' [for the restraint to be] fairly attributable to the State." *Patrick*, 486 U.S. at 100, 108 S.Ct. at 1663 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980)). In explaining the "active supervision" requirement, the Court has stated that:

> [t]he active supervision prong . . . requires that state officials have and *exercise* power to review

> particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick, 486 U.S. at 101, 108 S.Ct at 1663 (emphasis added).

Examining what happened in this case in light of this analytical approach, it is clear that the enactment of UFC § 79.601(d) cannot be viewed as fairly attributable to the Western Fire Chiefs. The WFCA did not authorize Robbins or the Article 79 subcommittee to draft a provision relating to tank lining. Rather, the Western Fire Chiefs delegated to the subcommittee the task of integrating the 1979 UFC and NFPA Standard 30, neither of which addressed the subject of tank lining. Moreover, neither the WFCA nor the UFC committee actively supervised Robbins or the Article 79 subcommittee in the code-promulgating process. Although the UFC committee and the WFCA no doubt had the power to review subcommittee proposals, neither group, in fact, exercised this power with respect to the provision banning tank lining. *Cf. Ticor Title Ins. Co.*, Trade Reg. Rep. (CCH) ¶ 22,744, at 22,443 (FTC 1989) ("To establish active state supervision [where party claims state action defense,] it is not enough merely to show . . . that the state statute governing the anticompetitive activity provides some mechanism for regulatory oversight. There must be a showing that the state actually exercised its authority."); 1 Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 213f, at 77-79 (1978)

(privately set restraint of trade cannot be immunized under *Parker* doctrine by inaction of state agency). The UFC committee simply did not review § 79.601(d). The committee did not examine proposed code changes unless a member of the subcommittee which proposed the change raised an objection at the UFC committee meeting; no member of the UFC committee, nor any other person at the UFC committee meeting in April 1981, questioned the proposed ban on underground tank lining. Similarly, the WFCA did not closely examine § 79.601(d). At the August 27-29, 1981 WFCA meeting, the Association was presented with the voluminous Article 79 as well as other proposed code changes. The WFCA delegated the task of rewriting Article 79 to a subcommittee precisely because WFCA officials had neither the time nor the expertise to do the work. The WFCA relied on the judgment of its subcommittee. The result was that both the UFC committee and the WFCA, in effect, rubber stamped the Article 79 subcommittee's proposal to ban the underground lining of tanks.[21] The most compelling evidence of this is that fire officials, familiar with the WFCA code-making process, did not wait for final WFCA

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[21] Joor contends that Sessions is responsible for any failure on the part of either the WFCA or the UFC subcommittee to review proposed § 79.601(d). According to Joor, Sessions should have objected to the proposal in the UFC subcommittee meeting or in the subsequent WFCA meeting. The antitrust laws, however, do not impose such an exhaustion of remedies requirement on plaintiffs. *See* Elhauge, *supra*, at 712-17 (antitrust defendant not entitled to state action defense simply because plaintiff has not pursued all state remedies before bringing antitrust claim) (citing cases).

approval, but instead enforced the UFC as soon as the Article 79 subcommittee finished its work.

In this case, because the disinterested fire officials, the UFC committee and the WFCA did not in fact exercise their power to review the proposed § 79.601(d), it was left to Joor, who "organized and orchestrated the actual exercise of the Association's decisionmaking authority "to set the standard." *Allied*, 486 U.S. at 507, 108 S.Ct. at 1940. Accordingly, Joor is not entitled to immunity from liability flowing from the effect § 79.601(d) had of its own force in the marketplace.

B. Antitrust Violation

Joor contends that, regardless of whether it is protected by *Noerr*, Sessions has not established a violation of § 1 of the Sherman Act. To prove a violation of § 1 of the Sherman Act, three elements must be established. A plaintiff must show (1) that there was combination, conspiracy, or agreement to restrain trade, (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or rule of reason analysis, and (3) that the restraint affected interstate commerce.[22] *E.W. French &*

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[22] Section 1 of the Sherman Act provides that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although this language literally prohibits *every* agreement, or other concerted activity in restraint of trade, courts have long recognized that Congress could not have intended this result; and courts have, therefore, interpreted federal antitrust laws to proscribe only unreasonable restraints on competition. *See Standard Oil Co. v. United*

Sons v. General Portland Inc., 885 F.2d 1392, 1397 (9th Cir. 1989); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 632-33 (9th Cir. 1987).

Section 1 claims are subject to a rule of reason analysis "unless the challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal [per se] without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' "[23] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985) (citation omitted); *see Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1387 (9th Cir.) ("*NFL*"), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984); *Bhan v. NME Hosps.*, Inc., 929 F.2d 1404, 1410 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 617, 116 L.Ed.2d 639 (1991); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 151 (9th Cir. 1989) (en banc). As standard-setting by a private association has not been found to fall within one of the per se categories, the antitrust validity of the restraint alleged

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States, 221 U.S. 1, 65, 31 S.Ct. 502, 517, 55 L.Ed. 619 (1911); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 617, 116 L.Ed.2d 639 (1991); *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984).

[23] Practices which are considered "illegal per se include horizontal price-fixing, division of markets, and certain tying arrangements." *See Bhan*, 929 F.2d at 1410.

here must be evaluated under the rule of reason.[24] *Allied*, 486 U.S. at 500-01, 506-07, 108 S.Ct. at 1937-38, 1940-41.

The rule of reason requires the fact finder to weigh the anticompetitive effects of an alleged restraint against its procompetitive benefits to determine whether the restraint imposes an unreasonable burden on competition.

> A section one claimant must initially prove three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition. After the claimant has proven that the conspiracy harmed competition, the fact finder must balance the restraint and any justifications or pro-competitive effects of the restraint in order to determine whether the restraint is unreasonable. This balancing process requires a thorough examination into all the surrounding circumstances.

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988) (citations omitted).[25]

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[24] In this case, there is no contention that Joor's conduct should be governed by a per se rule.

[25] A recent Ninth Circuit decision describes the analysis in a slightly different manner.

> To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. . . .
>
> . . . .
>
> Should the plaintiff satisfy his initial burden, the defendant must offer evidence of pro-competitive

Generally, proof that *Noerr* is inapplicable does not establish a violation of the Sherman Act. *See* 1 Areeda & Turner, *supra*, ¶ 204e2, at 51. In the context of a private standard-setting association, however, "[t]he issue of immunity . . . collapses into the issue of antitrust liability." *Allied*, 486 U.S. at 509, 108 S.Ct. at 1942. In other words, in proving that a defendant who lobbies a private association for the adoption of a standard is not immune under *Noerr*, a plaintiff necessarily satisfies *some* of the elements of a § 1 claim.

Obviously, proof that a private association's standard-setting activities do not qualify for *Noerr* immunity is also proof of the "concerted action" requirement of § 1. Under *Allied*, a defendant who exercises decision-making authority in the formulation of a private association's product standard has, in practical effect, agreed with other members of the association to restrain trade.[26]

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effects. The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner. Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance. *Bhan*, 929 F.2d at 1413.

[26] As Sessions named only Joor as a defendant in this action, it is unnecessary to determine whether any members of the WFCA or the Article 79 subcommittee besides those who were present for the March 17, 1981 vote could be held individually liable for the antitrust violation. Some decisions suggest that any member of a private association who is aware of illegal action by the association and does not protest may be liable under the Sherman Act. *See, e.g., Phelps Dodge Ref. Corp. v. FTC*, 139 F.2d 393, 396 (2d Cir. 1943). In more recent cases, courts have held that only members who actively participate in the association's illegal act may be liable. *See, e.g., Kline v. Coldwell, Banker*

"Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Allied*, 486 U.S. at 500, 108 S.Ct. at 1937.

In addition, in proving that *Noerr* does not apply because the defendant has subverted the standard-setting process, a plaintiff has, of necessity, also proved part of its rule of reason case: the plaintiff has shown that the alleged restraint of trade lacks procompetitive benefits. As pointed out by the *Allied* Court, standards set in private associations "based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, . . . can have significant procompetitive advantages." *Id.* at 501, 108 S.Ct. at 1937. Where, however, the decisionmaking process of a private standard-setting association has been subverted, a standard produced by that process does not promote competition. "[T]he hope of procompetitive benefits [in standard-setting] depends upon the existence of safeguards sufficient

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& Co., 508 F.2d 226, 232 (9th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975); *see also* 7 Phillip E. Areeda, *Antitrust Law* ¶ 1477, at 346 n.12 (1986) (suggesting that it is problematic to hold organization's members individually liable). Even under the more restrictive standard, members of the Article 79 subcommittee who voted for § 79.601(d) clearly could be held liable under the Sherman Act. These subcommittee members knew that Robbins was economically interested in restricting tank lining and knew that the subcommittee had not followed procedures to ensure that tank lining would be addressed in an objective manner. Nevertheless, they voted to ban tank lining.

to prevent the standard-setting process from being biased by members with economic interests in restraining competition." *Id.* at 509, 108 S.Ct. at 1942. If the safeguards to objectivity are not there, neither are the benefits.

This "collapse" of the immunity and liability issues does not obviate the need for plaintiff to establish the remaining elements of an antitrust violation. Although the *Noerr* inquiry establishes that the alleged restraint of trade lacks procompetitive benefits, the plaintiff must still show anticompetitive harm to satisfy its burden under the rule of reason.[27] Further, the plaintiff must demonstrate that the alleged restraint affected interstate commerce.

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[27] Sessions contends that, in proving that the defendant has failed the *Allied* test, it has established *all* of the elements of an antitrust violation. The Court rejects this argument. First, the *Allied* court stated that actions taken by a defendant to influence standard-promulgation by a private association, if not protected by *Noerr*, should be analyzed under the rule of reason. *Allied*, 486 U.S. at 500-01, 506-07, 108 S.Ct. at 1937-38, 1940- 41. Second, plaintiff's argument proceeds on the erroneous assumption that a standard-setting process which has been biased by an economically interested participant will necessarily produce standards that have anticompetitive effects. In *Allied*, however, the Court explicitly declined to endorse this assumption, noting that product standards set by private associations have a serious *potential* for anticompetitive harm. *Id.* at 501, 108 S.Ct. at 1937. The Supreme Court has cautioned against assuming the existence of anticompetitive effects where " 'economic impact . . . is not immediately obvious.' " *Consolidated Metal Prod., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 290 (5th Cir. 1988) (citing *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458-59, 106 S.Ct. 2009, 2018, 90 L.Ed.2d 445 (1986)) (holding that trade association's failure to certify equipment manufactured by plaintiff does not necessarily have anticompetitive effects and should not be treated as per se illegal).

In this action, Sessions has shown that Joor's activities adversely affected competition between tank liners and tank manufacturers. As a result of the adoption of the UFC, the business of underground tank lining was brought to a halt in many areas in California and other western states. The UFC provision deprived customers of the option of choosing the less expensive lining process instead of replacement. Thus, the Court need not engage in sophisticated market analysis to conclude that § 79.601(d) harmed competition. Where plaintiff shows "actual detrimental effects such as a reduction of output," there is no need for elaborate analysis. *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460, 106 S.Ct. 2009, 2019, 90 L.Ed.2d 445 (1986); *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Oltz*, 861 F.2d at 1448. As UFC § 79.601(d) adversely affected competition without promoting competition in some other respect, the Court has no difficulty finding that Joor unreasonably restrained trade.

The Court would reach this conclusion even under the "traditional" rule of reason inquiry; for the defendant has failed to advance any *legitimate* justification for UFC § 79.601(d). Defendant suggests that the model fire code provision promoted safety. But extra-competitive concerns, such as safety, are usually given no weight under the rule of reason. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688-95, 98 S.Ct. 1355, 1363-67, 55 L.Ed.2d 637 (1978) (holding that professional association's rule prohibiting competitive bidding violates Sherman Act § 1 regardless of the rule's effect on public

safety).[28] "[An] attempt to [justify a restraint of trade] on the basis of the potential threat that competition poses to the public safety . . . is nothing less than a frontal assault on the basic policy of the Sherman Act. . . . [T]he statutory policy precludes inquiry into the question whether competition is good or bad." *Id.* at 695, 98 S.Ct. at 1367. Moreover, even if safety were a legitimate justification for UFC § 79.601(d), the Court would find the model code provision to be unreasonable; for a rule significantly less restrictive than UFC § 79.601(d) could easily have ensured safety in the tank lining process. *See N.F.L.*, 726 F.2d at 1396 (availability of less restrictive alternatives is pertinent in evaluating reasonableness of restraint). A rule that prohibited underground lining of a tank unless certain structural specifications were met (as measured by designated tests) would have achieved the same end as the broad proscription contained in § 79.601(d).

Further, there is little question that Joor's activities affected interstate commerce.[29] Sessions, a California company, imported all of the epoxy which it used to line tanks from a company located in Florida. Moreover, Sessions lined many tanks in western states other than California. All of these activities were disrupted by what Joor did. *See McLain v. Real Estate Bd.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980).

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[28] However, the *Allied* Court did allude to the procompetitive benefits resulting from the promulgation of safety standards. *Allied*, 486 U.S. at 501, 108 S.Ct. at 1937.

[29] The parties have stipulated that the alleged restraint on competition operated to adversely affect interstate trade and commerce in the business of lining leaking underground storage tanks in the western United States.

C. Causation

One of the principal contentions made by Joor is that the injury to Sessions was not the result of anything done by Joor, but rather was the result of government action – the adoption of the UFC provision by local governments, or, in situations where there was no formal adoption, the enforcement by public fire officials of the ban contained in the provision. Joor argues not only that there is no significant causal connection between the claimed antitrust violation and Sessions' injury, but also that the injury did not flow from the acts of Joor claimed to be in violation of the antitrust laws. Put simply, Joor contends that Sessions has failed to prove both causation and antitrust injury.

The Court rejects the contention that the adoption of the UFC by local governments caused the injury plaintiff claims in this case. "To prevail under the Sherman Act, a plaintiff must not only show an unlawful restraint of trade, but also prove that the defendant is legally responsible for this restraint." *Sessions I*, 827 F.2d at 464; *see also Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44, 88 S.Ct. 1981, 1986-87, 20 L.Ed.2d 982 (1968) (White, J., concurring). In proving defendant's legal responsibility for a restraint, however, an antitrust plaintiff is not required to establish that the defendant's antitrust violation was the sole cause of its injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969). "It is enough that the illegality is shown to be a material cause [of plaintiff's] injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *Id.* Accordingly,

where plaintiff proves that it has suffered financial loss in the wake of the defendant's unlawful action, the defendant who raises what can be referred to as an "intervening cause defense" bears the burden of proving the existence of that intervening cause.

In this case, both sides agree that UFC § 79.601(d) was adopted by a number of local governments in California, although the record does not reflect specifically which local governments took such action or when they did it. Nor does the record reflect how Sessions' applications for permits to carry on tank lining were treated by any particular local government before as opposed to after it adopted the UFC provision. The Court has no evidence from which it could conclude that any specific refusal to permit tank lining was the result of any specific local ordinance being enacted.[30] What Sessions claims, and what it proved, was that its business was expanding prior to the subcommittee's action, and that it slumped dramatically after the subcommittee approved UFC § 79.601(d). It also proved that it was being granted permits freely before the subcommittee's action and was denied them thereafter, and that it was denied them even before any local government would have had the opportunity to consider and adopt UFC § 79.601(d) as law. Finally, Sessions proved that almost immediately after the adoption of UFC § 79.601(d) by the subcommittee and prior to its adoption by the WFCA, Joor "marketed" the

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[30] On this record, the Court could not apply the teaching of *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), but also does not find that its application is warranted.

stigma which it had caused the subcommittee to place on tank lining by sending letters to public agencies and customers urging its prohibition.[31] That is more than sufficient for the Court to conclude that there is a significant causal connection between Joor's actions and Sessions' injury, and that, if anything, the later adoption of UFC § 79.601(d) by various local governments only served to exacerbate Sessions' already existing injury. Sessions has established "independent marketplace harm" caused by the stigma, separate and apart from that caused by the adoption of UFC § 79.601(d) by local governments.

The Court also rejects Joor's contention that enforcement of UFC § 79.601(d) by local fire officials, and not Joor's actions, caused the injury claimed by Sessions. However, this contention is rejected on separate grounds, as there is specific evidence of this type of local government action in the record. In weighing this contention, the Court must focus on the legal effect to be given to the fact that while the anticompetitive restraint was based on

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[31] There are a number of letters in evidence sent by Mr. Robbins to various entities encouraging the prohibition of in-place lining of leaking tanks. These letters included four letters sent to the American Petroleum Institute ("API"), a trade organization of oil companies which, in turn, were the largest customer groups of both Sessions and Joor, in which Robbins advised the API of its moral and legal responsibility not to permit tank lining to continue. Similar letters were sent to the Underwriters Laboratories, Inc. and the National Fire Protection Association. Later, Robbins also sent letters like these to the County of Sacramento, the City of Los Angeles, the City of San Diego and the State of California Water Resources Board.

a private standard, not a local ordinance, it was nevertheless imposed by a public official who presumably had an executive duty to take action. As to this contention, the Court concludes that the public official's action does not relieve an economically interested person who exercised decisionmaking authority to formulate the private standard from liability he would otherwise have under the antitrust laws.[32]

There are certainly many cases in which a government official's adoption of an anticompetitive restraint at the behest of a private party has resulted in a finding that any injury to competition was the result of a governmental act rather than the private party's act. "The Sherman Act was not intended to make private parties liable, in the ordinary case, for governmental acts." *Sessions I*, 827 F.2d at 464. This is the conclusion reached, either explicitly or implicitly, in many cases finding *Noerr-Pennington* immunity. In *Pennington*, for example, Phillips charged the United Mine Workers and several large coal companies with conspiring to eliminate competition in violation of the Sherman Act by persuading the United

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[32] The *Allied* court did not decide whether a party who subverts the standard-setting process could be held liable for damages flowing from the adoption of an anticompetitive standard by government officials. In *Allied*, the Court expressly avoided this issue, noting that plaintiff was awarded damages solely "on the theory 'that the stigma of not obtaining [Code] approval of its products and [defendant's] "marketing" of that stigma caused independent marketplace harm to [plaintiff] in those jurisdictions *permitting* use of [the products].'" *Allied*, 486 U.S. at 498 n. 2, 108 S.Ct. at 1936 n. 2 (citing *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 941 n.3 (2d Cir. 1987), *aff'd*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988)).

States Secretary of Labor to adopt a high minimum wage for coal miners. In holding that the *Noerr-Pennington* doctrine covered this petitioning activity, the court explained: "It is clear under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. . . . [T]he action taken to set a minimum wage for government purchases of coal was the act of a public official." *Pennington*, 381 U.S. at 671, 85 S.Ct. at 1594; *see also* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 201, 206.1, at 14-16, 78 (Supp. 1990) (*Noerr* doctrine predicated in part on the notion that a government rule which effects an anticompetitive restraint is "proximately caused" by the government and not by the private party who persuades the government to adopt the rule); *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 574 (N.D. Cal. 1981) (holding defendants immune under *Noerr* where restraint "flows, not from the joint action of defendants, but from the [state] airport authorities' exercise of their statutory authority and duty to manage the facilities in their charge"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983).

Courts which have found government action to be an "intervening cause" breaking the link between a private party's pursuit of an anticompetitive restraint and a plaintiff's injury have been motivated by essentially three policy considerations. First, antitrust courts are reluctant to second-guess the decisions of better-informed government officials. This is especially true in the legislative

context.[33] *See, e.g. City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 1352-56, 113 L.Ed.2d 382 (1991) (declining to recognize "conspiracy exception" to the *Noerr-Pennington* doctrine for fear that exception would shift from elected officials to federal judges and juries the determination of what is or is not in the public interest). Second, antitrust courts are hesitant to "deconstruct[ ] . . . the governmental [decisionmaking] process" in order to assess whether a particular decision was the result of an "independent" governmental choice or rather the result of a private party's improper influence. *Id.*, 111 S.Ct. at 1352; *see also* Areeda & Hovenkamp, *supra*, ¶ 204.1d, at 69-71 (noting that it is often impracticable, especially in the legislative context, to establish a material connection between a private party's petitioning activity and a government-imposed restraint of trade). Third, antitrust courts often hold that a restraint is the result of government, as opposed to private, action to protect the citizen's first amendment interest in petitioning the government and to ensure that the government is

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[33] As a leading antitrust treatise has noted:

> [G]overnment learns about reality through a complex battle of contending political forces which speak truths and partial truths and exert diverse pressures upon various persons and institutions. Society recognizes that politics is often a rough and tumble affair. Many would feel, moreover, that definition and balancing are better left to legislatures, which have more political experience than the courts and which may be better able to appreciate the balance of contending forces. An antitrust suit may be too limited a context for that purpose.

1 Areeda & Turner, *supra*, ¶ 204c, at 47.

not deprived of useful information. *See, e.g., Noerr*, 365 U.S. at 137-38, 81 S.Ct. at 529-30.

Where these policy reasons do not obtain, however, courts have declined to find that government action is a "intervening cause" which shields the defendant who sought to bring about that action from antitrust liability. The best illustration is in the cases holding that the knowing submission of false information by a defendant in an adjudicatory proceeding is not protected under *Noerr*. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13, 92 S.Ct. 609, 612-13, 30 L.Ed.2d 642 (1972); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 895-96 (9th Cir.), *cert. denied*, 488 U.S. 965, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988). In this context, there is no risk that an antitrust court will interfere with a branch of government better able to evaluate the public interest. Moreover, in this setting, the causal nexus between the defendant's submission of false information and the decision of the adjudicatory body can usually be established by looking at the record. No "deconstructing" of the government decisionmaking process is involved. *See* Areeda & Hovenkamp, *supra*, ¶ 204.1d, at 69-71. In addition, an individual has a minimal First Amendment interest in deliberately lying to an adjudicator. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983) (deliberate misrepresentations of fact to an adjudicatory body or to an administrative body for anticompetitive purpose not entitled to first amendment protection).

Similarly, some courts have concluded that knowing misrepresentations in an administrative proceeding made

to induce an anticompetitive restraint are not entitled to *Noerr* protection. *See Clipper Exxpress*, 690 F.2d at 1259-63; *Israel v. Baxter Lab, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); Areeda & Hovenkamp, *supra*, ¶ 204.1, at 66-73 (citing cases). In *Woods Exploration*, plaintiffs charged that the defendant oil and gas producers filed false information with the Texas Railroad Commission to trigger a decision limiting plaintiffs' production allowances. The court held that the administrative decision was not an intervening cause of plaintiffs' injury and declined to afford *Noerr* protection to the false statement.

Most importantly, in *Sessions I*, the Ninth Circuit held that where an antitrust defendant misrepresents facts to an official acting in his administrative capacity, those misrepresentations will be actionable despite the *Noerr-Pennington* doctrine.[34] 827 F.2d at 468. The official's decision to impose a restraint on the basis of the defendant's knowing misrepresentations is not to be considered an intervening cause of plaintiff's antitrust injury. This case

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[34] The Ninth Circuit held that such misrepresentations fell within the sham exception to the *Noerr* doctrine. *Sessions I*, 827 F.2d at 465 n.5. In *Allied*, the Court explained that the sham exception to *Noerr* did not encompass this type of conduct. *Allied*, 486 U.S. at 508 n.10, 108 S.Ct. at 1941 n. 10. "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, not one 'who "genuinely seeks to achieve his governmental result, but does so *through improper means*." ' " *Omni*, 111 S. Ct. at 1354 (citations omitted). The *Allied* Court, while it objected to the Ninth Circuit's label, did not question its reasoning.

falls within the rule announced in *Sessions I*. In manipulating the standard-setting process, Joor caused the misrepresentation to be made to public fire officials that the Article 79 subcommittee, the UFC Committee and the WFCA had arrived at an objective and nonpartisan decision to ban the underground lining of tanks. These fire officials, plaintiff has shown, relied on this misrepresentation in denying permits to Sessions to engage in tank lining. In fact, in his letters and statements to fire officials, Robbins urged that they had an obligation to enforce the decision reached in the UFC standard-setting process even though he knew that that process had been subverted. Under these circumstances, the denial of permits by public officials cannot relieve Joor for liability for the injury to Sessions. Sessions' injury was caused by Joor and it flowed directly from Joor's antitrust violation.[35]

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[35] The conclusion reached here is also supported by *City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401 (9th Cir.), *amended by*, 886 F.2d 246 (1989), *cert. denied*, 493 U.S. 1076, 110 S.Ct. 1126, 107 L.Ed.2d 1032 (1990). In *City of Long Beach*, the plaintiff city filed an antitrust action against six major oil companies, alleging that the companies conspired to fix and maintain uniform, noncompetitive posted prices for crude oil produced from a field owned by the city. The district court granted summary judgment for the defendants on the ground that the federal government, which had established a federal price control program for crude oil, was the legal cause of any injury to the city. The Ninth Circuit reversed, stating that the federal program would not be a supervening cause of plaintiff's injury if plaintiff could show that the federal government would have set price ceilings at a higher level in the absence of the alleged conspiracy. *Id.* at 1408-09.

> The establishment of price ceilings by the federal government, after the alleged conspiracy began, does not in itself mean that the companies' conduct could

D. Antitrust Damages

After establishing that a defendant's antitrust violation caused the requisite injury, a plaintiff is afforded considerable latitude in proving damages.[36] *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985). Uncertainty as to the amount or extent of damages will not bar recovery. *J. Truett Payne Co.*, 451 U.S. at 565-66, 101 S.Ct. at 1929. "An antitrust plaintiff must simply provide evidence to support a '"just and reasonable estimate of the damage." ' " *Handgards, Inc.*, 743 F.2d at 1297 (citations omitted).

In this case, Sessions presented expert testimony to establish that it lost $ 1,160,606.00 in net profits as a result of the stigma caused by Joor's actions in violation of the antitrust laws. Plaintiff's expert testified that he derived this figure by comparing Sessions' business with the businesses of other licensed applicators of epoxy produced by the Bridgeport Chemical Company which were operating

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> not have caused the injuries. . . . [I]f the [federal] price ceilings were based on prices set artificially low as a result of an unlawful conspiracy, liability should still exist. . . . Mere ratification by government officials does not absolve an otherwise illegal conspiracy.

Id.

[36] All damages, however, must be traceable to an injury that was, in fact, caused by the defendant. *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081, 1168 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

in jurisdictions unaffected by the WFCA's pronouncement.[37] This method of estimating lost profit damages – the "yardstick" method – has been endorsed by the courts. *See, e.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257-58, 66 S.Ct. 574, 576-77, 90 L.Ed. 652 (1946); *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1102-03 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987). As defendant introduced no testimony refuting plaintiff's estimate, plaintiff may recover its lost profits, trebled under 15 U.S.C. § 15(a) (1988), for a total of $3,481,818.00. Plaintiff is also entitled to recover its cost of suit and its attorney's fees pursuant to 15 U.S.C. § 15(a).

As to the attorney's fees, the Court has reviewed the plaintiff's motion in support of its application for an award of fees and has considered the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). In particular, the Court assigns considerable weight to the novelty and difficulty of the questions involved, a factor which can hardly be the subject of controversy given the extent of the appellate court attention directed to this case. To the same point, having reread the transcript at the trial and having reflected on

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[37] The plaintiff's damage study, Exhibit 308, covers fiscal years 1981-1988. The calculation for the first year of the damage study is not based on the same theory as the subsequent years, but rather on the number of permits denied in California. A small number of these denials occurred before March 17, 1981. Nevertheless, the Court finds an award of damages for the first year is justified based on all of the evidence, including that of Joor's activities prior to the March 17, 1981 meeting.

the experience and ability of counsel, the Court agrees that only the most skilled attorney could find a path through the thicket of issues which finally grew up here. Accordingly, the Court makes an award of $859,844.00 for attorney's fees, which is the lodestar amount without the requested adjustment to current time rates, and also without the application of a multiplier.

II. *Intentional Interference With Prospective Advantage Claim*

The California Supreme Court has articulated the elements of the tort of intentional interference with prospective economic advantage in a number of cases: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Youst v. Longo*, 43 Cal.3d 64, 71 n. 6, 729 P.2d 728, 733 n.6, 233 Cal.Rptr. 294, 298 n. 6 (1987). To prove this tort, a plaintiff must establish that it was "reasonably *probable*" that economic advantage would have been realized but for the defendant's interference. 43 Cal. 3d at 71, 729 P.2d at 733, 233 Cal. Rptr. at 298.

In this case, Sessions demonstrated that it had actual and prospective economic relationships with oil companies and others who owned underground tanks. Also, Sessions showed that there was a reasonable probability that these customers would have done business with it

but for Joor's activities which led to the adoption of UFC § 79.601(d). Further, Joor knew that it competed with Sessions and knew of the existence of the business relationships between Sessions and its actual and potential customers. In this regard, the evidence shows that a large number of Sessions' customers were also customers of Joor. Nevertheless, Joor engineered and orchestrated, with the specific motive and purpose of disrupting Sessions' relationship with its customers, the adoption of UFC § 79.601(d).[38] As discussed above, Joor's activities imposed a stigma on Sessions' business, thereby damaging it severely.[39] Accordingly, plaintiff is entitled to judgment on this claim in the amount of $1,160,606.00. Since the Court has awarded all of the damages sought by plaintiff on the antitrust claim, the damages on the tort

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[38] "It is the intentional attainment of an unjust advantage which underlies the requirement that the interference be improper. . . . " *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1348 (9th Cir. 1980).

[39] It is not clear under the California law of tortious interference whether damages can be awarded for the loss of net profit to be derived from potential business with unspecified customers. *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 464 U.S. 994, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983); *In Re Super Premium Ice Cream Distribution Antitrust Litig.*, 691 F. Supp. 1262, 1271 (N.D. Cal. 1988), *aff'd mem. sub nom. Haagan-Daz Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990). However, in a situation where the plaintiff's established concern competes with the defendant and is put out of business by the defendant's wrongful conduct, there should be "a limit to the exactness the defendant [ ] can demand" in proving damages. *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 329 (7th Cir. 1982), *rev'd on other grounds*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

claim should not be added to those awarded on the antitrust claim.[40] Thus, the total award is $ 1,160,606.00, the damages on the antitrust claim to be trebled. The Court finds that an award of punitive damages would be inappropriate in this case. Plaintiff is also awarded its cost of suit on the tort claim.

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[40] The problem of duplication of damages in cases involving both antitrust and tort claims has been addressed by a number of district courts. *See Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 327 (7th Cir. 1982).

(2)

No. 93-1885

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SESSIONS TANK LINERS, INC.,

Petitioner,

vs.

JOOR MANUFACTURING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT JOOR MANUFACTURING, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private party can be held liable under federal antitrust laws for anticompetitive restraints resulting from valid governmental action. *See Sessions Tank Liners v. Joor Manufacturing*, 17 F.3d 295, 298 (9th Cir. 1994).

RULE 29.1 STATEMENT

Respondent Joor Manufacturing, Inc. has no parent corporation; it owns less than a fifty percent interest in Tanx, Inc. (N.H.).

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ARTICLE

E. Elhauge, *Making Sense of Antitrust Petitioning Immunity,*
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The respondent Joor Manufacturing, Inc. ("Joor") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 17 F.3d 295 (9th Cir. 1994).

RESPONSE TO STATEMENT OF THE CASE

There is no dispute about the dispositive fact in this case: the only damage petitioner Sessions Tank Liners, Inc. ("Sessions") suffered flowed directly from government regulation, rather than any private anticompetitive conduct. The Court of Appeals found that:

> Sessions has never proved that it sustained injuries from anything other than the actions of municipal authorities. *Sessions*, 786 F. Supp. at 1532. . . . . The injuries for which Sessions seeks recovery flowed directly from government action.

Sessions, 17 F.3d at 299. Even the Petition's convoluted statement of the question presented explicitly concedes that the injury for which Sessions seeks redress resulted not from a private restraint, but from "governmental denials of permits to the excluded rival." Pet. at i.

Sessions' assertion that the Court of Appeals "ignored" the District Court's legal conclusion that Sessions "established 'independent marketplace harm' " is incorrect: the Court of Appeals directly addressed that legal conclusion and found that there was no proof of such harm. The District Court found no injury flowing

from anything other than denial of government permits.[1] 17 F.3d at 299. The Court of Appeals reversed the District Court's legal conclusion that Joor could be held liable under the antitrust laws for influencing such government permit denials. *Id.* at 300. This Court decides the case as it was framed by the Court of Appeals. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 498 & n.2 (1988).

Although Joor challenged the factual findings of the District Court on appeal, the Court of Appeals found it unnecessary to reach those issues "[b]ecause the only anticompetitive injuries that Sessions complains of are the direct result of governmental action . . . . " *Sessions*, 17 F.3d at 301 & n.4. It was not necessary to address Joor's contentions that the District Court lacked evidence to sustain its findings that Joor used improper means in the course of its lobbying efforts, because the Court of Appeals concluded that even if Joor had done so, the District Court erred as a matter of law. *Id.* Because those factual findings are not relevant to this Court's review of the decision below, Joor does not challenge them here. Joor notes, however, that Sessions distorts the Court of Appeals opinion to the extent it implies that the Court of Appeals agreed with, approved or adopted the District Court's factual findings.

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[1] Moreover, Sessions can point to nothing in the record that contradicts the Court of Appeals. The District Court found no evidence that Sessions' injuries flowed from anything other than governmental denial of permits. *Sessions Tank Liners v. Joor Manufacturing*, 786 F. Supp. 1518, 1532 (C.D. Cal. 1991).

REASONS TO DENY THE WRIT

There is no reason to grant the writ. The decision below is in harmony with this Court's decision in *Allied*, 486 U.S. 492, as well as its more recent decision in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991);[2] it is consistent with every decision of every court of appeals to have considered the question since this Court issued its opinion in *Allied*; and it presents no new issue for this Court's review. Sessions' attempt to manufacture a basis for the discretionary exercise of this Court's jurisdiction relies on (1) distorting and ignoring this Court's precedents, (2) inventing a conflict among the circuits that does not exist, and (3) mischaracterizing a settled issue of law as one which has yet to be decided by this Court. This obfuscation, however, should not distract this Court from the undisputed and dispositive fact that the only injury Sessions suffered flowed directly from government action, rather than private anticompetitive action. The Court of Appeals' application of settled law to this fact is correct, wholly unremarkable and does not merit this Court's review.

I. The Decision Below Is Consistent With the Letter and Spirit of this Court's Decisions in Both *Allied* and *Omni*.

Sessions' contention that the Court of Appeals' opinion is at odds with the precedents of this Court

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[2] *Allied* and *Omni* have been identified, along with this Court's decision in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) as a "new trilogy of cases" which defines this Court's most recent guidance on petitioning immunity. *See* E. Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1179 (1992).

reveals only a dogged determination to misconstrue those precedents. Beginning with its decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), to its most recent decision in *Omni*, 499 U.S. at 379-80, this Court has repeatedly affirmed the principle that antitrust liability does not attach to concerted activity to influence government action; it only applies to private conduct that itself operates to restrain trade.[3] Where, as here, the only injury complained of results from government action, then there is no claim for violation of the antitrust laws. *Id.* This Court has made clear beyond any doubt that the government's motives and the cause of those motives in imposing a trade regulation is irrelevant to the antitrust inquiry: the only relevant question is *who* imposes the restraint, not *why*. *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1144 (1st Cir.), *cert. denied*, 114 S. Ct. 70 (1993).

As the Court of Appeals found, Sessions never pleaded or proved injury flowing from anything other than governmental action. Seeking to avoid this barrier to antitrust liability, Sessions tries to trivialize it, arguing here for the first time that this industry "generally requires government permits for the use of the product," Pet. at i; that this is a "fortuitous fact," Pet. at 10; that "the particular standard is one which, by its nature, requires governmental action," Pet. at 10; and that it was a "fortuitous fact that the excluded tank lining process required *a priori* governmental approval," Pet. at 12. Yet the fact that the Uniform Fire Code standard (which still

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[3] *See also United Mine Workers of America v. Pennington*, 381 U.S. 657, 671 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

requires underground storage tanks that are leaking hazardous fluids to be removed from the ground, rather than lined) was implemented only through government regulation is not "mere" or "fortuitous" or insignificant but is overwhelming and dispositive of this case.[4] If no government had forbidden lining of leaking tanks, Sessions would have suffered no injury at all.

The opinion below is not in conflict with the letter or policy of this Court's precedents. As lucidly explained by the Court of Appeals, there is a "key distinction between *Allied* and this case":

> The plaintiff in *Allied* was awarded damages only on the theory that the stigma of banning the plaintiff's product from a uniform code caused independent marketplace harm to the plaintiff in jurisdictions that permitted the use of the plaintiff's products. . . . . Unlike the plaintiff in *Allied*, Sessions was not awarded damages on the theory that Joor's "marketing the stigma" . . . caused Sessions any loss of business independent of the losses resulting from the permit denials. The injuries for which Sessions seeks recovery flowed directly from

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[4] Even if this Court accepted the absurd notion that the market sought out government regulation, that fact would do nothing to help Sessions avoid the insuperable barrier that any injury it suffered resulting from such regulation would not be redressable under the antitrust laws. This is one of many dramatic factual distinctions between this case and *Allied*, including differences between Joor's conduct in the Western Fire Chiefs Association, which is an association of government officials, and the Allied defendants' conduct before the National Fire Protection Association, which is an association of private industry.

> government action. *This fact takes the case entirely out of the realm of Allied.*

17 F.3d at 299 (citations omitted; emphasis added). Indeed, the opinion of the Court of Appeals is fully consistent with *Allied*'s most fundamental premise: Where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to private action, those urging the governmental action enjoy ***absolute immunity*** from antitrust liability for the anticompetitive restraint. *Allied*, 486 U.S. at 499.

II. There Is No Conflict Among the Circuits

The conflict among the circuits that Sessions urges this Court to resolve is illusory. First, none of the cases cited interprets *Allied*, as each of them predates that decision by from three to as many as thirteen years.[5] Since *Allied*, every circuit to have considered the issue presented here has agreed with the Ninth Circuit that no antitrust liability flows from government regulation. *See Sandy River*, 985 F.2d at 1143 (holding that "the significant factor is direct market effect"); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1383 (7th Cir. 1992) (holding bar associations immune from antitrust liability for injuries resulting from court adoption of rules), *cert. denied*, 114 S. Ct. 551 (1993); *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1505 (11th Cir. 1991) (holding that when the restraint is the result of governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability); *Juster Associates v. Rutland*, 901

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[5] See cases cited in Petition at 13.

F.2d 266, 271 (2d Cir. 1990) (holding developer immune from antitrust liability because restraint complained of resulted from governmental action).

Second, each of the cases Sessions cites discusses the "sham" exception to the *Noerr* doctrine, which is not at issue here. The "sham" exception to *Noerr* immunity applies when "persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon," *Omni*, 499 U.S. at 380; it does not apply to exempt from antitrust immunity "one 'who "genuinely seeks to achieve his governmental result, but does so through improper means." ' " *Id.* (quoting *Allied*, 486 U.S. at 508 n.10).[6] The sham exception does not apply here because there is no contention that Joor was not genuinely seeking to influence government regulation and there is no evidence that Joor's activities resulted in any restraint other than that resulting from government regulation.

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[6] Most of the cases Sessions cites are in accord with this principle. See *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971) ("conduct . . . not action designed to influence policy . . . does not justify antitrust immunity"), *cert. denied*, 404 U.S. 1047 (1972); *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1505 n.14 (1985) (same); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 812 (2d Cir. 1983) (conduct not undertaken in the hope of influencing governmental action, but in the hope of delaying it, falls under sham exception), *cert. denied*, 464 U.S. 1073 (1984); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982) (conduct "intended only to delay competitive action, not to influence governmental action" is a mere sham), *cert. denied*, 459 U.S. 1227 (1983).

Third, in *Allied* and again in *Omni*, this Court expressly rejected the interpretation of the "sham" exception urged by Sessions. Indeed, that interpretation – that governmental action induced by improper means is a "sham" – was rejected by this Court specifically in reference to the earlier Ninth Circuit opinion in *Sessions*. *See Allied*, 486 U.S. at 507 n.10 (citing and rejecting the opinion in *Sessions Tank Liners v. Joor Manufacturing*, 827 F.2d 458, 465 n.5 (9th Cir. 1987)); *Omni*, 499 U.S. at 380.[7]

III. This Case Does Not Present A New Issue Of Law

This Court has decided – several times now – that where the only anticompetitive injury results from governmental action, rather than private restraint, the use of improper means to secure that governmental action is immune from antitrust liability. *See Omni*, 499 U.S. at 383 (holding that there is no "conspiracy" exception to *Noerr* immunity and that " 'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned,' " quoting *Noerr*, 365 U.S. at 145); *Allied*, 486 U.S. at 499, 508 n.10 (rejecting "improper means" exception to *Noerr* immunity and holding where the restraint results from governmental action, as opposed to private action, there is absolute immunity from antitrust liability); *Noerr*, 365 U.S. at 145 (holding party who "deliberately deceived the public and public officials"

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[7] To the extent that the District of Columbia Circuit's opinion in *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279-280 (D.C. Cir. 1972) (or any of the cases cited in footnote 6, *supra*), adopts the "improper means" test for the sham exception, it too was implicitly overruled by *Allied*, 486 U.S. at 507 and *Omni*, 499 U.S. at 382.

entitled to immunity). Thus, Sessions' argument that this case presents an undecided issue for review is disingenuous at best.

The reason that the Ninth Circuit declined to "deconstruct" the decision making process of government is precisely because no injury flowed from anything other than governmental action.[8] The Ninth Circuit did not conclusively presume (as argued in the Petition) that the government action from which Sessions' injury flowed was not influenced by Joor; rather, as a matter of law, it concluded that such an inquiry was

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[8] The cases Sessions cites are inapposite. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976) the issue was application of the state action defense under *Parker v. Brown*, 317 U.S. 341 (1943), a defense that Joor has never raised in this case. Further, in *Cantor*, this Court did not "deconstruct" the governmental decisionmaking, but held that injury flowed independently from the private restraint. *Cantor*, 428 U.S. at 594. Finally, *Cantor*'s continuing vitality has been placed in doubt by subsequent decisions of this Court. See *California Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985); *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1333 & n.2 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) this Court held that an action to enforce a patent knowingly procured by fraud may constitute a violation of § 2 of the Sherman Act. The *Walker Process* doctrine, which has been limited to enforcement of legal monopolies, does not apply here as Joor did not engage in enforcement action of any kind. *See California Eastern Laboratories, Inc. v. Gould*, 896 F.2d 400, 403 (9th Cir. 1990).

Finally, *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *St. Amant v. Thompson*, 390 U.S. 727 (1968), are libel cases which do not address the issues presented here. Sessions never alleged that it was libeled; it alleged Joor violated the antitrust laws.

irrelevant and even repugnant to the principles underlying *Noerr. Sessions*, 17 F.3d at 300. As the Ninth Circuit opinion points out, if courts engage in deconstructing the reasons for government decisionmaking to impose antitrust liability, the petitioning immunity would be meaningless, as it would shield nothing that would otherwise cause liability. *Id.* It is only if some restraint flows directly from private action that further analysis would be warranted. That is not the case here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 93-1885

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SESSIONS TANK LINERS, INC.,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF OF PETITIONER

Petitioner, Sessions Tank Liners, Inc. ("Sessions") respectfully submits this Reply Brief in Support of its Petition for a Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit reported at 17 F.3d 295 (9th Cir. 1994).

I.

THE DECISION BELOW EFFECTIVELY "OVERRULES" THIS COURT'S DECISION IN *ALLIED*

Assuming the Ninth Circuit's conclusion that the damages in this case flowed entirely from the decision of governmental bodies to deny Sessions permits to line underground storage tanks in place, then, of course, this case is factually distinct from *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). In *Allied*, this Court "decide[d] the case as it was framed by the Court of Appeals." *Id.* at 498 n.2. The Second Circuit "determined that [Indian Head] was awarded damages *only* on the theory 'that the stigma of not obtaining [Code] approval of its products and [Allied's] "marketing" of that stigma caused independent marketplace harm to [Indian Head] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit.' " *Id.* (emphasis in original). The Ninth Circuit, cavalierly sweeping aside the reasoned district court determination that Sessions' damages were also a result of the stigma and its marketing, concluded instead that because the decisionmakers who precluded the use of Sessions' process were governmental officials it was legally impermissible to inquire whether they were

influenced by the stigma or its marketing. The Ninth Circuit concluded that the governmental decisionmaking process could not, as a matter of law, be "deconstructed."

The practical, real world effect of that decision is to emasculate *Allied*. Now, an economically interested decisionmaker can corrupt the process to the maximum extent and produce all the invidious results described by this Court in *Allied* and by Professor Phillip E. Areeda in 7 *Antitrust Law* § 1503 at 373 (1986), with absolute impunity if a governmental body enacts the rigged standard into law, or if, as here, governmental approval is required for product use, or if the government body is itself the purchaser of the product subject. This cannot be the result the Court intended to flow from its decision in *Allied*. If *Allied* is to have continuing vitality, this case, as framed by the Ninth Circuit, requires the Court to consider and decide whether, having violated the antitrust law and lost any *Noerr* protection, a wrongdoer is entitled to an entirely separate *Noerr* analysis in connection with causation/damages. This important question, ***not*** presented by the way the Second Circuit "framed" the issue in *Allied*, is now presented for review.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS

Respondent argues that there can be no conflict among the circuits because the cases cited by petitioner were pre-*Allied*. The cases cited by Sessions[1] each involve,

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[1] *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Greenwood Utilities Commission v. Mississippi*

as here, deliberate misrepresentations. However, these misrepresentations were made directly to a governmental body. Yet in each case the court permitted the plaintiff to seek damages flowing from the governmental decision. In short, the various courts of appeals "deconstructed" the governmental decision and found it to be the product of deliberate misrepresentations not protected by *Noerr*. But in this case, despite its finding that respondent had engaged in deliberate misrepresentations and other audacious and reprehensible conduct to exclude petitioner's process, the Ninth Circuit finds that governmental decisions regarding approval or purchase of a product cannot be examined and are conclusively presumed to be uninfluenced by such illegal and unprotected conduct. Accordingly, this Ninth Circuit decision cannot be reconciled with the Fifth, Second and District of Columbia Circuits and, indeed, is contrary to an earlier decision of the Ninth Circuit itself.

Power Co., 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

III.

RESPONDENT'S DISTINCTIONS OF PETITIONER'S CASE ALLOWING DECONSTRUCTION OF GOVERNMENTAL DECISIONMAKING ARE MEANINGLESS

Finally, respondent's effort to distinguish *Cantor*[2] and *Walker Process*[3] is hardly genuine. Of course this case does not present a state action issue as in *Cantor*. Nor does it present an alleged fraud on the U.S. Patent Office as in *Walker Process*. But distinguishing the nature of the conduct does not alter the analytic legal process involved in arriving at the decision. In both *Cantor* and *Walker Process* this Court allowed plaintiffs to recover only after examining whether governmental decisionmakers (the Michigan PUC and the U.S. Patent Office) were influenced by private actors. In short, both cases inherently required "deconstruction" of governmental decisionmaking, the exact process the Ninth Circuit holds is impermissible.

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[2] *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976).

[3] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

IV.

CONCLUSION

The Ninth Circuit decision in this case not only threatens to eviscerate *Allied* and permit flagrant corruption of the private standard-setting process, it is in conflict with the decisions of other circuits and rests on a premise (the impermissibility of deconstructing governmental decisionmaking), which has already been rejected by this Court. Accordingly, this decision warrants review by this Court and we urge that a Writ of Certiorari issue.

Respectfully submitted,

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